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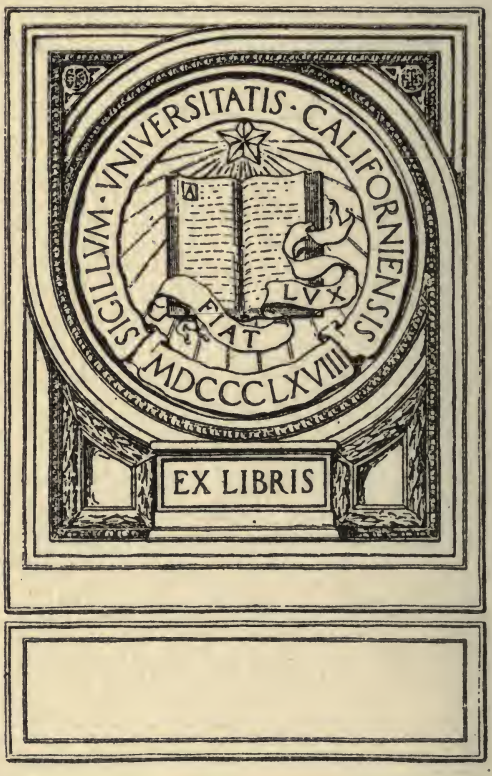
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T. A. LACEY, M.A.

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TO THE BISHOP OF LONDON

MY LORD,—

I dedicate this book to my chief, whose care for the practical working of the holy institution of which it treats is not the least among the burdens of his heavy charge. I do not ask your Lordship's permission to publish it, because that is not the custom of our Church, but none the less on that account do I submit my conclusions to the judgment of those who are set over me in the Lord. To teach nothing but what the Catholic Church prescribes or allows is the purpose of

Your Lordship's obedient servant,

T. A. LACEY

September, 1912.

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EDITOR'S GENERAL PREFACE

IN no branch of human knowledge has there been a more lively increase of the spirit of research during the past few years than in the study of Theology.

Many points of doctrine have been passing afresh through the crucible; "re-statement" is a popular cry and, in some directions, a real requirement of the age; the additions to our actual materials, both as regards ancient manuscripts and archæological discoveries, have never before been so great as in recent years; linguistic knowledge has advanced with the fuller possibilities provided by the constant addition of more data for comparative study; cuneiform inscriptions have been deciphered, and forgotten peoples, records, and even tongues, revealed anew as the outcome of diligent, skilful and devoted study.

Scholars have specialized to so great an extent that many conclusions are less speculative than they were, while many more aids are thus available for arriving at a general judgment; and, in some directions at least, the time for drawing such general conclusions, and so making practical use of such specialized research, seems to have come, or to be close at hand.

Many people, therefore, including the large mass of the parochial clergy and students, desire to have in an accessible form a review of the results of this flood of new light on many topics that are of living and vital interest to the Faith; and, at the same time, "practical" questions—by which is really denoted merely the application of faith to life and to the needs of the day—have certainly lost none of their interest, but rather loom larger than ever if the Church is adequately to fulfil her Mission.

It thus seems an appropriate time for the issue of a new series of theological works, which shall aim at presenting *a general survey* of the present position of thought and knowledge in various branches of the wide field which is included in the study of divinity.

The Library of Historic Theology is designed to supply such a series, written by men of known reputation as thinkers and scholars, teachers and divines, who are, one and all, firm upholders of the Faith.

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It would be clearly outside the scope of this series to deal with individual books of the Bible or of later Christian writings, with the lives of individuals, or with merely minor (and often highly controversial) points of Church governance, except in so far as these come into the general review of the situation. This detailed study, invaluable as it is, is already abundant in many series of commentaries, texts, biographies, dictionaries and monographs, and would overload far too heavily such a series as the present.

The Editor desires it to be distinctly understood that the various contributors to the series have no responsibility whatsoever for the conclusions or particular views expressed in any volumes other than their own, and that he himself has not felt that it comes within the scope of an editor's work, in a series of this kind, to interfere with the personal views of the writers. He must, therefore, leave to them their full responsibility for their own conclusions.

Shades of opinion and differences of judgment must exist, if thought is not to be at a standstill—petrified into an unproductive fossil; but while neither the Editor nor all their readers can be expected to agree with every point of view in the details of the discussions in all these volumes, he is convinced that the great principles which lie behind every volume are such as must conduce to the strengthening of the Faith and to the glory of God.

That this may be so is the one desire of Editor and contributors alike.

W. C. P.

LONDON.

PREFACE

IT may be objected that there is in this book more about law than befits a work professedly theological. The criticism is just, and I can meet it only by protesting that I have reduced the legal element within the narrowest possible bounds. Marriage cannot be extricated from its legal environment; my aim has been to show how, in spite of that environment, the religious and theological aspect of the holy estate may be kept in view. It is useless to ignore facts, but they can be adjusted. I trust, however, that as my book has no claim to be considered a legal treatise, so also it will be found free from any false pretensions of the kind. It is not furnished with any apparatus of legal instances, and I have tried everywhere to deal only with the broad features of human law. Not here only have I avoided the appearance of erudition which a copious display of citations may cheaply purchase. Few references will be found at the foot of my pages, those few being almost entirely confined to cases of actual quotation, where authority seemed to be needed for a statement made in the text. What is common knowledge of the well informed, I have usually been content to leave as such. Where reference is made to documents of a more public kind, such as Acts of Councils and Statutes, it seems reasonable to expect that all readers who are competent to verify what is said will know where to find the texts. The occasional mention of

an author to whom I am indebted for information or for ideas would be invidious, and to mention all would be impossible. Should anyone think that I have conveyed away without acknowledgment something of his own, let him rejoice to find that he has contributed to the common stock ; I ask for no better usage of what may be mine.

It may be well to warn the reader about my use of two words. In this book, as in my little *Handbook of Church Law*, I have confined the word *legal* to a precise meaning. Borrowing an idea from authors who carefully distinguish *leges* and *canones*, I use it only of that which is ordained by the laws of the medieval Temporalty, or of the State as distinguished from the Church. The English word *law* has so wide and varied a meaning, covering both *ius* and *lex* and ranging from the law of gravitation to the by-laws of a railway company, that a thing may lawfully be called lawful for other reasons, but I call a thing legal only when it has this particular sanction, and with the help of this distinction it is sometimes possible to avoid tiresome periphrases. I use the word *divorce* with equal precision. In my pages it means the breach of marital intercourse by which husband and wife are discharged, with the approval or toleration of lawful authority, from the obligation to live together according to the nature of their union. It means this, and nothing else ; and I am convinced that the word ought to have no other meaning. A decree of nullity ought not to be called divorce, because it is a declaration that in point of fact there has been no binding contract. I do not use the word in speaking of that dissolution of marriage, proclaimed by some systems of law, which is supposed to set the parties free to contract a new marriage, because I believe that in point of fact there can be no such thing ; marriage is a natural relation which can no more be dissolved by law than the relation of brother and sister, and I object

to applying a word which has a real meaning to a thing which does not exist. Confusion lies that way.

It seemed probable that the Report of the Royal Commission on Divorce would be published before my book went to press. This has not happened ; but my loss is the less if I may venture to think that I have anticipated its conclusions. Divorce is a painful necessity of human society ; unnecessary consequences are deduced from it, and I have examined to the best of my power both the necessity and the deductions.

I have had two objects. One is to ascertain facts ; the other is to draw from them a policy. The one task I have pursued through many pages ; the other I have attempted in few words. The result of each is remitted to the judgment of the reader, that of the latter more especially to the judgment of the Church.

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MARRIAGE IN CHURCH AND STATE

CHAPTER I

Of Marriage in the Order of Nature

MARRIAGE is described as "an honourable estate instituted of God in the time of man's innocency." Translated into less symbolic language, this means that marriage is an integral part of the natural order in which human society is constituted. That state of things is natural in which man finds the fullest and most satisfactory development of his nature. But this is possible only in a social order. As a mere individual, man can hardly exist at all, and certainly cannot live the fulness of his life. Some kind of community is necessary for him, and that kind of community in which genuine human functions are best fulfilled is the kind properly natural to him. Aristotle, therefore, conceiving the Greek city as the final and perfect form of human society, described man as "naturally a civic animal." Historic proof that no one form of organization is exclusively necessary for humanity compels the enlargement of this description; but the principle on which it was based remains true, and we may recast it into the aphorism that man is naturally civilized. The truth of this must be

maintained on two faces. On the one hand, civilization is not an artificial addition to man's natural endowments; on the other hand, the true natural man must not be sought in the state of savagery, but in the most complete state of civilization of which he is capable.

This complete state is doubtfully ascertainable. Ethics and politics are not exact sciences. We must suppose a creative idea, a divine purpose, to which human life more or less remotely conforms. This imperfect conformity is one of the chief perplexities of nature. For the most part we see life maintained in stable conditions, with specific characters; we can find traces of a progress by which those characters have been attained, but a point is reached where they seem to become fixed; the species is unalterable, breeding true and transmitting habits liable to little or no variation. The human species has such determined characteristics, but has also other characteristics remarkably variable. Human life is not in a stable condition, like that of most animals; human society has not reached a static condition, like that of bees or of ants. The divine purpose is imperfectly fulfilled, by reason of the element of perversity which is perceptible in human nature, and which is theologically attributed to a falling away from original righteousness, or conformity to the creative idea. If there is progress towards the ideal, there is also deterioration; if there is growth there is also decay. There is not, as Aristotle thought, one fixed standard of civilization, though such a standard may conceivably be attained. But none the less certain fundamental institutions can be made out, which are almost constant in human life, though subject to wide variations in detail; and in most cases an ideal can be ascertained, the practice falling short of it, or being deflected from it, in varying degrees. Such an institution is marriage.

Marriage is not an artificial regulation of human life, but

a natural necessity. The continuance of the species requires a certain association of man and woman. For the mere begetting of children, a merely passing union would suffice; but more is required. The child requires close attention and long continued care. This is seen in the case of some other animals also, but nowhere in the same degree. For most of such cases, the ordinary provision of nature is a close association of the parents during the growth of the offspring, the female devoting herself almost entirely to them, the male guarding her and supplying her needs. This double parental instinct varies in strength; it is probably seen at its intensest in man. But here it is reinforced. Unlike other animals, man gives birth to fresh offspring while those already born are still entirely dependent on the parents. It follows that a temporary union, having in view the bearing of a single child and terminable when the child is able to go alone, will not suffice; child-bearing goes on for several years, while the firstborn and others are slowly growing to maturity. The connexion of the parents, therefore, is indefinitely prolonged, extending even beyond the age of child-bearing. There results a community of interests, an interlacing of habits. As a consequence of this prolonged intimacy there appears the singular phenomenon of human love, which touches on the one hand the ordinary sexual desire of the animal world, but extends on the other hand into an habitual affection from which the element of desire may be entirely eliminated. In the same way the parental and filial affections of the human species pass the bounds even of the most devoted care shown by those animals which part from their young after a brief period of protection. In a word, the human species is naturally constituted in families.

Marriage is nothing else but this permanent connexion of man and woman for the purpose of producing and raising

children. Being thus natural, it is divinely ordered; all that can be ascertained to be necessary for its natural perfection will be recognized as prescribed by God. The element of perversity in human nature forbids us to suppose that all the divine prescriptions will be exactly or generally observed; the divine law of marriage cannot be reconstructed by a mere codification of human practice; we must look for many aberrations. It is useless to attempt to go behind social developments and investigate the habits of primitive man, for primitive man is inaccessible; those savage tribes whose civilization is most elementary are, in respect of marriage, bound by elaborate rules, the outgrowth of age-long custom; and, since marriage is an affair only of adults, we cannot find traces of its original form in those vestiges of a remote past which physiology teaches us to recognize in the instincts of children. But the inevitable imperfection of an historical survey matters little; it is not the beginning of marriage that we should consider, but the end; the growth and decay of social conventions shows man struggling to achieve what nature dictates; in his efforts, even the most halting, we shall find traces of the formative idea; the more perfect civilization will approach nearer to the ideal, and a failing civilization will be marked by fresh aberrations.

A purely historical study of this kind may be expected to give valuable results, but they will be dashed with uncertainty. What is the standard by which we are to measure the higher civilization, and how shall we note the turning point to a downward course? It is a common practice to make the treatment of marriage a criterion, and we are involved in a vicious circle if we simultaneously determine the true nature of marriage by reference to civilized practice. It is difficult to compare two civilizations differing in time and place and conditions; men pass a

favourable judgment on their own customs, and the greatest complacency has prevailed at times in which history sees evidence of general decline and retrogression. If the true nature of marriage can be ascertained only from the current practice of human society, that will seem true which a self-satisfied generation finds to its taste ; history may correct the judgment, but cannot guard against new errors. There is no finality in the flux of human opinion ; man cannot attain the ordered state of creatures which he reckons incomparably inferior.

Christianity opens a way out of this intolerable labyrinth. The Christian is confident that he has the express guidance of God in the more difficult passages of his moral life, and particularly in respect of the true nature of marriage. Since no man is ever merely individual, the redemption of man means not only the deliverance of the individual from the effects of sin, but also the reconstitution of human society according to the Will of God. In the Christian scheme, neither result is brought about by a mere act of omnipotence ; grace is given by which man may work out, through many temptations and failures, his own salvation. Grace and truth go together ; sufficient knowledge of the Divine Will is needed if its fulfilment is to be achieved. Therefore a declaration of the purpose of God in regard to human life is a part of the Christian scheme. It is not detailed, categorical, all-embracing ; it is not a law of ordinances ; it affords just so much light as may enable men to walk warily.

The revelation of God through Jesus Christ touches some things naturally unknowable ; it touches chiefly things knowable but obscure. St. Paul, indeed, seems to deny the obscurity. "That which may be known of God is manifest," he says ; "for from the creation of the world His unseen things are perceived and understood by means

of His works." [1] Ignorance therefore, he would say, is inexcusable, being due to human perversity. That is an extremely severe judgment, designed to bring home to the conscience the general guiltiness of man ; it does not alter the fact that to ordinary men of perverse minds, if not to the human mind in its integrity, the purpose of God is obscure, and the definite principles of their own social existence are hard to seek. The Christian revelation throws new light on the social order of humanity.

The nature of revelation, as touching these things, cannot be misunderstood. They are things in the order of nature, being ordered as such by God. A revelation from God will not, therefore, proclaim a new law ; the will of God has been imposed on nature from the first, and the divine law was legible in nature, however imperfectly read. We must not suppose a less perfect law of nature superseded or completed by a more perfect law of revelation. The divine law is one and continuous, in nature and in revelation.[2] The divine law of marriage is nothing else but the order of nature. Revelation does but enable us to understand it more perfectly.

We therefore find that our Lord Jesus Christ, when asked a question about the divine law of marriage, referred to what had been done " from the beginning." This beginning He was content to describe in the language of the Book of Genesis. It must not be inferred from this that a rule propounded in the Scriptures of the Old Testament, even with the highest sanction, is necessarily an expression of the Divine Will ; for our Lord immediately afterwards told

[1] Romans i. 19–20.

[2] Cp. Isidore, *Etym.* v. 4 : Ius naturale est quod in lege et in evangelio continetur. More comprehensive is the definition of the *Institutiones*, lib. iii., tit. 2. Ius naturale est quod natura omnia animalia docuit.

the same questioners that a certain regulation of the Mosaic law was a mere concession to human perversity and the hardness of men's hearts, in derogation from the creative idea of God.[1] It is only in the teaching of the Gospel, in the genuine Christian tradition, that we have a conclusive declaration of the divine purpose.

With this help we have to determine more particularly the true nature of marriage.

Marriage is an entire union of man and woman. For the purpose of generation, a momentary connexion suffices, with complete separation following. In a highly artificial society, such as that conceived in the Republic of Plato, children so born might be reared in common, as foundlings and orphans are actually reared in most civilized communities. But this would be a frustration of the natural instinct of parentage, and the practical evils flowing from it are sufficient proof that the suppression of that instinct is not an advance in the line of natural development. A partial union, directed exclusively to the business of raising children and allowing the separation of man and woman in regard to other interests, may suffice for the material needs of the offspring; such connexions are not unfrequent in societies where artificial distinctions of rank hinder a closer union; but the moral influence of one parent is inevitably weakened, and the full purpose of guardianship is not attained. This can be achieved only when the parties to the union enter fully and unreservedly into one another's lives, or rather into a new joint life which they share on equal terms. In the words of the Roman jurist, marriage is *viri et mulieris coniunctio individuam vitae consuetudinem continens.*[2]

St. Paul insisted that carnal copulation, even of the most transitory kind, effects a real union: "He that is joined

[1] St. Matthew xix. 4–8.

[2] *Instit.*, lib. i., tit. 9.

to a harlot is one body."[1] The natural conjunction is evident when it produces offspring, derived inseparably from the two parents, and the Apostle applies the maxim, "The two shall become one flesh." This emphatic judgment has left its mark on the ecclesiastical law of affinity. If a connexion so transitory, entered upon for the mere gratification of appetite without any but the most accidental regard for the procreation of children, can be thus described, much more does the description fit the permanent union of husband and wife for the full purpose of marriage. To this the maxim originally applied, and with that application it was incorporated by our Lord into His own teaching.[2]

This merging of two lives into one has been obscured by a one-sided conception of the relation, due to the practical superiority of the man over the woman. His greater strength, activity, and publicity, contrasting with the comparative retirement necessary to a woman engaged in the task of child-bearing and nurture, have made it seem, commonly though not universally, that the wife is absorbed into the family of her husband. A result is seen in the practice of the Roman law, by which a wife passed from the *patria potestas* of her father to that of her husband, or to that of his father if he himself were not yet discharged. Similar ideas pervade the marriage customs of almost all races, in whatever degree civilized. They have some foundation in nature, since they rest on the normal conditions of sex, but they depart from nature in their denial of the individuality of the human being. This individuality is no less characteristic of human life than the social order without which human life is impossible; in marriage, rightly understood, the two characteristics are equally

[1] 1 Corinthians vi. 16.

[2] St. Matthew xix. 5; St. Mark x. 8.

recognized ; an individual man and an individual woman coalesce into a conjoined life, becoming an individual pair from which springs a new society. Marriage is properly a discharge from parental control ; husband and wife, without loosing the natural ties of blood connecting them severally with their former kindred, pass away from the families in which they were bred to form in their union a new family. It is the teaching of the Gospel, appropriating once more and reinforcing an ancient maxim. Not the woman alone, but also the man, " shall leave his father and mother, and shall cleave to his wife ; and the two shall become one flesh."

From this coalescence it follows inevitably that the husband becomes akin to the kindred of his wife, in the same degree as herself, and she to his. What the more usual practice of mankind acknowledges only in the case of the woman is true also by parity of nature in the case of the man. The relation known as affinity is no less natural than that of consanguinity.

This close union of husband and wife has the further consequence of engendering a new kind of natural affection. The tie of near kinship is felt for a time by animals of many species ; with men, bred and nurtured in families, it subsists longer and even extends beyond a generation ; a man and a woman bind themselves together in wedlock with a feeling of peculiar intensity. Sexual attraction, which affords the natural impulse to marriage, passes into a love rooted and established in habit. It has been well said that a wife's love for her husband becomes above all love for the father of her children ; frustration of motherhood sometimes produces deplorable disorders, but the bare intention of procreating children in common, even if disappointed, will bring about a sense of identity, of a single purpose in life, which makes the closest bond of human

affection. "Husbands should love their wives," says St. Paul, "as their own bodies. He that loves his wife loves himself; for no man ever hated his own flesh, but nourishes and cherishes it." [1]

Indeed there is here found a secondary cause for the divine institution of marriage: "It was ordained," says the homily in the Form of Solemnization of Matrimony, "for the mutual society, help, and comfort, that the one ought to have of the other, both in prosperity and adversity." A marriage unfruitful in children may thus find a place in the economy of nature.

From this complete unity of life there seems to follow naturally community of goods. Some degree of community is necessary if the end of marriage is to be attained. The children are a joint charge, and the maintenance of a home can hardly be managed by a partnership of limited liability. The long continuance of an unequal discrimination of law in favour of the husband has obscured in some countries the obvious and equitable requirements of nature, paving the way for an excessive independence in married life; frequent failures of duty on the part of husband or wife make it necessary in practice to give each of them legal securities against the crime or carelessness of the other; but community remains the true basis of economics in the family. The formula of marriage, "With all my worldly goods I thee endow," indicates the normal state of things; and it should in effect be mutual.

Marriage is thus, in the order of nature, an entire conjunction of two lives, to be lived as one for the purpose of achieving the end proposed: *totius vitae consortium.*

The marriage-bond is exclusive; *Coniunctio solius cum sola.* An adumbration of this principle is seen in the fierce jealousy with which certain wild animals keep their mates

[1] Ephesians v. 28–9.

to themselves. In men, the instinct of jealousy is reasoned, without losing much of its peremptoriness. Carnal intercourse of husband or wife with another is all but universally recognized as one of the gravest offences against social order; adultery is a private wrong of so exasperating a character that on grounds of policy it is in many communities treated as a public crime; elsewhere, private vengeance is condoned, or even permitted. But a very different measure is meted to husband and to wife. The adultery of a husband with an unmarried woman is treated as a minor offence, and the wife's jealousy is seldom justified by law or social opinion if it runs to extreme action; a wife's adultery is regarded as a much graver wrong. Christian doctrine allows no such distinction, reinforcing the natural instinct of jealousy on both sides alike by indiscriminating condemnation of adultery as a sin at once of luxury and of injustice; but this teaching has not succeeded in controlling the social judgments, even of Christian communities. There is, indeed, a difference between the two cases, imposed by nature; the adulterous wife may put upon her husband a spurious offspring, the adulterous husband can do no such thing. If the sin against chastity is identical in the two cases, the effect of the sin of injustice is greater in one case than in the other; social custom and law can hardly fail to recognize the difference, and to visit the offence more severely where the wrong done is the greater. But a general condonation of adultery on the husband's part, coupled with deprecation of jealousy on the wife's part, is characteristic of a corrupt state of society in revolt against the dictates of nature no less than against the teaching of Christianity. It destroys the idea of marriage as a conjunction *solius cum sola.*

Equally in conflict with that idea is the legal institution of polygamy. So widespread, however, is this, that it may

seem rash to declare it contrary to nature, and grave opinions can be quoted in favour of its being permissible by natural law. That of St. Augustine is conspicuous. He takes his stand upon a physiological ground; plurality of wives, as distinct from plurality of husbands, is not contrary to the nature of marriage, "plures enim feminae ab uno viro fetari possunt, una vero a pluribus non potest." [1] He supports this by the fanciful analogy of one master having many slaves, while one slave can have only one master, and by the more dangerous argument that one true God is the Lord of many faithful souls, while for a soul to go after many gods is the fornication of idolatry. This might certainly be pleaded, if pertinent at all, in favour of polygamy among Christians, since the figure of marriage is expressly used to illustrate the relation of the faithful to Christ. But St. Augustine, with many others following him, treats the restriction to monogamy as an arbitrary discipline imposed by divine authority on Christians, thus introducing the confusion inevitably caused by the supposition of a divine law over-ruling the law of nature. He seems to have been moved to this mainly by an unwillingness to attribute to the Fathers of the Old Testament any ignorance or disregard of a divine institution; the concubinage of Abraham, the polygamy of Jacob and of David, were therefore to be justified as in accordance with natural law, and he laboured to maintain that in all such cases the one motive was a desire to fulfil the divine injunction of fruitfulness.[2]

It is an obvious objection to this theory that no trace can be found of any express prohibition of polygamy in the preaching of the Gospel. If the maxim, "The two shall become one flesh," can be stretched to imply such prohibition, which is a very doubtful resource, there is no new rule

[1] *De bono coniugali*, 17. [2] *De bono viduitatis*, 7.

introduced, for appeal is made to the primary institution of marriage. The maxim is directed against an abuse of the institution which is remotely, if at all, connected with polygamy; it forbids separation from one wife, not the addition of another. Attempts have been made to bring into this connexion St. Paul's rule requiring a bishop to be "the husband of one wife," as though polygamy were allowed in ordinary Christians and forbidden only to those called into the sacred ministry; but this interpretation is impossible in view of the corresponding regulation about consecrated widows;[1] if it could be shown that plurality of wives was tolerated in any of the communities to which the regulation extended, it is certain that plurality of husbands was unknown. There can be no doubt that the rule was intended to exclude those who had contracted a second marriage after separation by death or divorce.

In the absence of any express prohibition of polygamy, it is invariably assumed by the writers of the canonical books of the New Testament, and by the constant witness of the Christian Church, that monogamy is the rule. It is assumed in the condemnation of marriage after divorce; for, if it were lawful to take a second wife while retaining the first, it would *a fortiori* be lawful to take a second after repudiating the first.[2] It may be taken for certain that the lack of any express prohibition is due to the fact that the practice of polygamy was unknown among those to whom the Gospel was preached. But these men either had the Scriptures of the Old Testament in their hands, or were speedily introduced to them as containing the oracles of God; and these books recorded without blame the polygamy of the Fathers.

[1] 1 Timothy iii. 2; v. 9.

[2] But conversely, the allowance of *successive* polygamy in case of divorce (*infra*, p. 104) cannot be pleaded in justification of *simultaneous* polygamy, which alone is here in question.

Therefore, if it was not necessary to warn men against following this example, it must be inferred either that polygamy was still permissible, or that men were already convinced of its natural impropriety. The former alternative being inadmissible, the latter is imposed. It follows that the obligation of monogamy was learnt by the light of nature. With this all Christian practice agrees. Unsupported by any positive prohibition, the Christian witness against polygamy has been unwavering. Whatever toleration may at times have been accorded to illicit connexions, the union *solius cum sola* has been recognized as the only true marriage. Apart from the completely abnormal cases of the Anabaptists and the Mormons, the only serious attempt of any one claiming the Christian name to relax this rule is found in the allowance of a second wife accorded by Luther and Melanchthon to Philip of Hesse; the secrecy with which this was done, and the shame of its authors on detection, are the most eloquent assertion of the rule which they violated.

If monogamy is required by natural law, a reason for it must be found in nature. Theologians from the time of St. Thomas Aquinas commonly seek this in a consideration of the *bona matrimonii*, the three ends of marriage defined by St. Augustine, *proles*, *fides*, *sacramentum*.[1] What militates against these is held to be contrary to natural law. Plurality of wives does not, says St. Thomas, or his reporter, in any way hinder the procreation of children; it does to some extent injure the mutual trustfulness and accommodation which is *fides*; it entirely ruins the *sacramentum*, which is the mystical signification of the union of Christ with the one Church. Thus it is contrary to nature in respect of the second and third ends of marriage.[2]

Consideration of the sacramental character of marriage is

[1] *De bono coniugali*, 24, and *De Genesi*, ix. 7.
[2] *Sum. Theol.*, Suppl. 65, 1.

postponed ; but here it may be remarked, *first*, that a sacrament is not strictly in the natural order, and that, even if marriage be supposed to have been instituted with a view to its sacramental use, the violation of that ultimate purpose can hardly be construed as a contradiction of the original institution ; *secondly*, that St. Thomas himself, or his reporter, allows a certain congruity of polygamy with the mystical significance of marriage, " quia quamvis non significaretur coniunctio Christi ad Ecclesiam, inquantum est una, significabitur tamen per pluralitatem uxorum distinctio graduum in Ecclesia ; quae quidem non solum est in Ecclesia militante, sed etiam in triumphante." [1] In the same place he allows also that *fides manet ad plures*. His theological reasons for condemning polgyamy therefore break down.

Firmer ground is needed. It may without difficulty be secured in a consideration of the approximate equality of the sexes under ordinary natural conditions. Abnormal conditions are known to produce a preponderance of one sex. The practice of polygamy is probably due, in part, to a redundance of women, in part to the selfish aggrandisement of powerful men. These causes in combination will account for its establishment by law, but it obviously cannot be general without an enormous disparity of numbers in the two sexes ; in point of fact, it seems to be usually a privilege of chieftainship or of wealth. But a practice due to abnormal conditions, and open only to persons abnormally placed, is no part of the order of nature.

But further, polygamy can be shown to militate actively against the well-being of the race, which must be assumed as a true object of the natural order. It is found in practice to make for less fecundity. The eugenic plea that it implies breeding from the stronger and more virile stock, true in

[1] *Sum. Theol.*, Suppl., 65, 2.

the case alike of wild beasts and of cattle, is nullified in the case of men by the diminished efficiency of fatherhood and of education within the family. The gravest objection, however, is that under normal conditions polygamy condemns a proportion of one sex to sterility, and to the moral evils flowing from the frustration of natural instincts. This result is recognized in a significant manner; the employment of eunuchs is a regular accompaniment of the practice. To these more public evils should be added a private wrong suffered within the marriage-bond. Polygamy destroys the mutuality of right and duty on which the union of husband and wife properly rests. "The wife has not command of her own body," says St. Paul, "but the husband; and so too the husband has not command of his own body, but the wife." [1] The due cannot be freely rendered, except on condition that each man has but one wife, and each woman but one husband. This last argument was urged by St. Thomas in his more philosophic mood, as also the fine contention that polygamy destroys equality of love between husband and wife, introducing a servile relation. "Apud viros habentes plures uxores," he remarks, "uxores quasi ancillae habentur." [2]

Polygamy, whether in its usual form or in the rarer form of polyandry, is thus seen to be contrary to natural law; no supernatural revelation is required for its rebuke, and none has been given. The practice, however widespread, is an aberration; the civilization which insists on monogamy is in the true order of human development. Marriage in the order of nature is the union *solius cum sola.*

The entire union of man and woman effected by marriage is indissoluble except by death. That death dissolves it is evident from the fact that its whole aim is concluded within

[1] 1 Cor. vii. 2–4. [2] *Summa contra Gentiles*, iii. 124.

the compass of this present life. The obvious inference is supported by the answer of our Lord to the Sadducees that "in the resurrection they neither marry nor are given in marriage."[1] It is the constant teaching of Christianity. "A wife is bound," says St.Paul, "for so long time as her husband lives; but if the husband be dead, she is free to be married to whom she will."[2] The discouragement of second marriages, which has been a marked feature of some stages of Christian discipline, is not due to any doubt on this head, but only to the conviction that widowhood, like virginity, is a higher state. "She is happier if she abide as she is, after my judgment," adds St. Paul; "and I think that I have also the Spirit of God."

"A wife is bound for so long time as her husband lives," says the Apostle; and this, like every other obligation in marriage, is mutual. It is unqualified. But it may be urged with some show of reason that other circumstances, as well as death, put a natural end to the union. The first purpose of marriage is frustrated by sterility; a violent dislike or incompatibility of temper may drive the parties asunder, and so frustrate both the hope of children and the good of family life; enforced separation, as by sentence of law, insanity, or certain kinds of disease, may have the same effect; adultery, at least on the wife's part, involves a breach of the purpose of marriage even more serious. By the operation of these causes, it has been argued, the union is naturally dissolved, no less than by death.

But marriage is not instituted for one cause only, so as to be frustrated by sterility,[3] nor is it a mere social union entered upon for certain specific objects with reservation of the right to withdraw from it in case of failure. It is an

[1] Matt. xxii. 30. [2] 1 Cor. vii. 39. Cp. Rom. vii. 1–3.
[3] See, however, below, p. 28, for the case of impotence.

entire union, completed by natural copulation prior to the achievement of any such objects, and retaining its effect in spite of subsequent disappointment. It is a natural union, as intimate and indestructible as that of parent and child. The purpose of nature in the relation of parent and child may be frustrated by separation as completely as in the case of husband and wife, but the parent does not cease to be parent or the child cease to be child ; their mutual obligations may be obscured or suspended, but cannot be definitely cancelled. "Marriage is ideally indissoluble," says a recent writer, who perhaps does not go the whole way with me in tracing consequences, "the relation of husband and wife being like that of father and son, or brother and sister, where there may be casual alienation or even separation without altering the fact of the relationship." [1] If marriage were a mere contractual relation, an artificial partnership, it would be terminable not only by a failure to achieve its object, but even more equitably by mutual consent ; because it is constituted in the order of nature, and not only at the will of the parties, it is indissoluble except by an event equally in the order of nature ; and this can be found only in death. By virtue of nothing short of this can the husband cease to be husband, or the wife cease to be wife.

Against this conception of marriage as naturally indissoluble is set the general practice of mankind allowing its dissolution for certain causes, and the marriage of the separated husband and wife to fresh partners. So profoundly has this practice affected the customary morality of human society, that grave doubts have been entertained whether marriage should be regarded as indissoluble by natural law, and not rather as made indissoluble by positive enactment. Oppressed by the precedents of the Old Testament and by his

[1] D. Macfadyen, *The Messenger of God*, p. 93.

respect for that Roman jurisprudence which asserted with the utmost solemnity the perpetual obligation of natural law, St. Augustine taught that only in the *civitas Dei*, or Christian commonwealth, was this quality impressed on the union of man and wife ; in the natural order they might separate, as allowed by Roman law, and contract fresh marriages ; entering into the Church, they lost this liberty, being more straitly conjoined by virtue of the sacramental efficacy given to the natural institution.[1] His opinion has had immense effect on Christian teaching, but he was not entirely consistent with himself ; in discussing St. Paul's directions about separation from an unbelieving consort he definitely treated the presumably pagan marriage as debarring the Christian party from any fresh union,[2] and as being therefore fundamentally indissoluble. If it were not so, the Christian party, repudiated by the other, would be free to marry, and this interpretation of St. Paul's teaching has, in fact, been accepted by modern theologians.

The natural law being thus called in doubt, we look for guidance to the evangelic revelation. It will be seen that two questions are raised : (*a*) Whether it is permissible for husband or wife on any account to withdraw from the close union which is marriage ; and (*b*) if this be allowed, whether the marriage is thereby dissolved so that the parties are free to enter into fresh unions. Such separation is properly called divorce, whether it implies dissolution of the marriage bond or not ; it is only by an abuse of language that the word is otherwise defined. We have to ascertain, then, from the teaching of the Gospel, whether divorce is permissible ; in what cases it may be allowed, if

[1] See especially, *De nuptiis et concupiscentia*, i. 10. Observe also that he objected to making marriage after divorce a bar to baptism. *De Fide et Operibus*, 19.

[2] *De adulterinis coniugiis*, i, 25.

at all; and whether it effects a dissolution of marriage.

St. Paul's ruling is peremptory. Replying to specific questions put to him from Corinth, he wrote: "To the married I give commandment—not I, but the Lord—that a wife is not to be separated from her husband (but if she be separated let her remain unmarried, or be reconciled to her husband), and that a husband is not to put away his wife." [1] So far, no exception of any kind is allowed; in the case where separation has *de facto* taken place, a fresh marriage is forbidden. A little later, he answers a question about the remarriage of widows, which he allows, but with reiteration of the principle that the bond cannot be dissolved while the parties are both alive.

But here comes in the one exception, commonly known as the *privilegium Paulinum*. It is introduced by the phrase, "To the rest say I, not the Lord." Who are these? He has addressed two classes, the unmarried and widows, whom he advises to remain unmarried; the married, whom he warns against divorce. So difficult it is to find a third class, that some have referred the words in question to the former of these classes, as though he said, "To the married I forbid divorce in the Lord's name, but to those others I only give my own advice." The construction of the whole passage, however, does not favour this interpretation, and the phrase seems clearly to be an introduction to what follows. There is then a third class of those who do not belong to either of the previous categories. It is plain who they are. They are Christian men or women, mated with unbelieving consorts. They seem to be set in a class apart because the Apostle addresses none but believers, and therefore, when he speaks to the married, he has in view those cases only in which both parties are Christian; for these others there is something else to be said. But now he answers the question put to him

[1] 1 Cor. vii. 10–11.

on his own authority, not alleging any express teaching of the Lord. "If a brother has an unbelieving wife," he says, "and she consents to live with him, let him not put her away; and a wife who has an unbelieving husband, and he consents to live with her, let her not put him away. . . . But if the unbelieving party makes separation, let it be so; the brother or the sister is not enslaved in such cases."

Such is the Apostle's ruling, divested of the arguments with which he pleads for its acceptance. Its meaning is quite clear, but those arguments are helpful to a fuller understanding, since they suggest the form of the question which he was answering. There was probably a definite rule that Christians should marry, as he casually remarks lower down, "only in the Lord"; what was the duty of converts already married whose consorts remained unbelieving? Should the marriage stand, or should they take advantage of the law which allowed divorce? St. Paul replies that "the unbelieving husband is sanctified in his wife, and the unbelieving wife is sanctified in the brother." The marriage may therefore stand. The Christian party is not merely allowed to continue in this union, but is forbidden divorce. If, however, the unbelieving party effect a divorce, no steps need be taken to hinder it. What steps could be taken? St. Paul probably has in mind the case of the unbeliever demanding, as a condition of continued wedlock, something inconsistent with the profession of a Christian. A Christian is not a slave, he protests. The question remains whether the Christian party, being so divorced, is free to marry. St. Augustine, as above noted, says not. The contrary opinion has generally prevailed, but it rests on the supposition that marriage is not naturally indissoluble, which we are now examining. The Apostle himself gives no ruling,[1] and it is

[1] It is impossible that δεδούλωται, v. 15, should be equivalent to δέδεται, v. 39.

probable therefore that he leaves this special case under the general rule that a wife separated from her husband must remain unmarried.

What St. Paul taught the Corinthians in reply to an express question, he wrote also more at large in his epistle to the Romans. "Do you not know, brethren (for I speak to men who know law), that the law has dominion over man so long as he lives? For the married woman is bound by law to her living husband, but if the husband die she is discharged from the law of her husband. So then, while the husband lives, she will be called adulteress if she be joined to another man; but if her husband be dead, she is free from the law, so as not to be an adulteress when joined to another man."[1] It should be observed that the Apostle is here appealing to a known principle, in illustration of an argument concerned with other matters. There was a recognized Christian law. Was this peculiarly Christian, or was it the natural law reinforced by Christian teaching? It rested on a saying of the Lord, currently reported among the faithful. For further elucidation, that saying must be identified.

Such a saying is recorded in four places of the canonical Gospels, two of which are clearly identical; the others are in a separate setting.

In the tenth chapter of St. Mark and the nineteenth of St. Matthew is the story of the Pharisees who put to our Lord the test question whether it was lawful for a man to divorce his wife; St. Matthew adds the particular that they asked whether it were lawful "for every cause," glancing at the later practice of the Jews. He answered by a reference to the primary institution of marriage, by which man and woman become "one flesh," deducing the consequence, "What God joined together let not man put asunder." Confronted with the Mosaic legislation about divorce, He replied that

[1] Rom. vii. 1–3.

this was allowed because of men's hard-heartedness, which has been variously interpreted to mean their stubborn refusal to follow the divine ideal or the harshness with which they would treat a wife who could not be dismissed. Then follows a gnomic saying which St. Mark reports to have been delivered in private to the disciples as a further instruction, and which is also recorded, without note of time, elsewhere in St. Matthew and in St. Luke. It cannot be doubted that this was the saying of the Lord to which St. Paul referred. It will be well to place side by side the forms in which it is recorded, with verbal variations.

Matthew v. 32. Every man divorcing his wife, apart from the cause of fornication, makes her commit adultery; and whoever marries a divorced woman commits adultery.

Matthew xix. 9. Whoever shall divorce his wife, unless for fornication, and marry another, commits adultery; and he who marries a divorced woman commits adultery.[1]

Mark x. 11. Whoever shall divorce his wife and marry another, commits adultery against her; and if she, after divorcing her husband, marry another, she commits adultery.

Luke xvi. 18. Every man divorcing his wife and marrying another commits adultery; and a man marrying a woman divorced from her husband commits adultery.

It is to be observed that this teaching of our Lord is expressly based on the natural institution of marriage. He is not giving a new law to Christians. He is enforcing and explaining the natural law which had been corrupted through man's hard-heartedness. On this ground divorce is explicitly forbidden; and further, if divorce takes place *de facto*, marriage of the divorced is forbidden as involving the guilt of adultery. That is to say, in spite of divorce the natural

[1] The text of this passage is doubtful, but not in any particular seriously affecting the sense.

relation, the *vinculum*, remains intact. If it were not so, union with a divorced woman, however strongly condemned on other grounds, could not be called adultery. It is adultery, and therefore the previous marriage-bond remains unbroken.

The one excepted case calls for brief consideration. It is peculiar to St. Matthew. But further, it contrasts remarkably with the general manner of our Lord's teaching. Wilhelm Bousset has remarked with justice on His practice of laying down the commandment of God in all its absoluteness in face of the endless distinctions and exceptions which made the system of the Pharisees.[1] There is no other example of such an exception in the Gospel; the rule of conduct is laid down peremptorily, and whatever exceptions or economies may be necessary in practice are left to the conscience or to the regulation of human authority. Bousset, therefore, bluntly rejects this exception as an interpolation. There is no ground, however, for doubting its authenticity in the text; but it is not improbably a gloss, inserted by the evangelist, calling attention to a practice recognized in the Church when he wrote. The consideration of its meaning may therefore be defended until we come to speak of marriage in relation to human law. It is sufficient to say here that the excepted cause justifies only the separation of husband and wife; it is interjected parenthetically for this purpose, and does not affect the subsequent judgment that the marriage of the divorced is adulterous. An exact comparison of the second passage from St. Matthew with the corresponding citation from St. Mark makes this abundantly clear. So it was understood without hesitation by all Christian writers commenting on the words, until the entanglement of the Church with the Empire in the fourth century

[1] Bousset, *Jesus*, p. 144 (Engl. transl.).

moved men to find some common ground for Christian teaching and Roman law. Those who held the general opinion that our Lord expressly sanctioned the divorce of an adulterous wife, and those who held, as Hermas,[1] that it was even sinful to cohabit with her, nevertheless emphatically declared that the husband dismissing her would himself be guilty of adultery if he married another. The bond of marriage, that is to say, remains unbroken by divorce. Moreover, this teaching is grounded on the natural institution of marriage. Marriage is therefore indissoluble in the order of nature.

This intimate and indissoluble union of man and woman is effected by means of a contract. Since two individual lives are to coalesce in one, without prejudice to the true personality of either party, they must come together by a free act of mutual surrender and acceptance. The husband, says St. Paul, does not retain full control of his own body, nor the wife of hers; an abnegation which would be intolerable, and even immoral, on any other basis but that of mutual consent. This free contract of marriage, properly called the wedding of man and woman, is more or less recognized in all forms of civilization; but the predominance of the male, and the imperfect freedom of the unmarried woman, usually make it a one-sided affair; yet even marriage by capture, which is common to many savage races and curious vestiges of which linger in others of the most highly developed culture, differs from mere rape in assuming the contented acquiescence of the prey; indeed, the analogous habits of the brute creation suggest that the foray, real or pretended, looks not so much to the bride herself as to the males of her tribe from whom she is stolen.

It is not here, however, but in a state of complete civilization, that we must seek evidence of the true nature of the

[1] *Pastor*, Mand., iv., 1.

marriage contract. Even in Roman law, despite the subjugation of children *in patria potestate*, it was agreed that marriage was effected by the consent of the parties.[1]

Other systems of law also require the consent of parents to the marriage of a man or woman below a certain age, and it is difficult to say whether in the absence of such consent the marriage is naturally void. The subjugation of young children to their parents is unquestionably natural for so long a time as is required for their preservation, but no fixed limit can be set; the age of independence defined by positive law is merely artificial. It is generally allowed that consent of wedlock should be considered naturally possible as soon as the parties are of an age to fulfil the marriage contract. If, however, it can be shown that marriage at so early an age is injurious to the individual or to the race, it may seem that natural law imposes further restraint; and a marriage contracted in defiance of such restraint may be held naturally void.

A similar argument may possibly establish restraint of marriage between persons who for lack of bodily or mental health are unable to fulfil the ordinary obligations of marriage, to rear and educate children, and to render the mutual services implied in the holy estate of matrimony. It may be held that such persons are naturally incapable of entering upon a contract, the terms of which they are naturally incapable of fulfilling. It is evident that a growing knowledge of nature may bring with it a more accurate perception of natural law, and refinements of this kind are not to be rejected as impossible; but our knowledge of human physiology is not at present complete enough to serve for the formulation of rules in such matters.

[1] "Nuptias non concubitus sed consensus facit."—Ulpian. in Tit. *de Divers. Reg. Iur. Antiq.* 30.

Setting aside these doubtful questions, we find certain conditions generally acknowledged as requisite in a valid contract of marriage.

First, genuine marriage must be intended. A mutual contract of man and woman to render some only of the offices involved in marriage would not be sufficient. It might do no more than set up a relation of concubinage, to be terminated at will. It is not enough that the proposed relation be called marriage. If it be entered upon with a mutual agreement to frustrate any of the true purposes of marriage, as for example to avoid the procreation of children, or to have no community of life, such restrictive conditions will render the contract void, and there will be no marriage. It is obvious that if one party have this vicious intention, the other being privy to it, there will be the same defect in the contract. If the intention be secret on either side, a difficult question may arise; the contract may be held good because of its openly expressed terms, but action taken and persisted in, such as refusal to consummate the union or to cohabit, may betray the defective intention and so nullify the pretended marriage. An avowed purpose of continuing the union only for a limited period, or until a divorce is in some way effected, will make the contract void; but a mere implication of such purpose need not be equally destructive. If two persons contract marriage, for example, in a society or under a system of law which treats the bond as normally dissoluble, it does not follow that they intend a merely temporary union; it is enough that they purpose marriage, though a general opinion which they themselves share erroneously regards the consent as revocable. God has joined them together by a natural bond, though it be supposed that man can put them asunder. Otherwise there would be no marriage except where the truth of the indissolubility of marriage

is known and received; there would have been no genuine marriage among the Jews or the other peoples to whom the Gospel was preached. The fact that from the first converts to the Church were received as truly married effectively disposes of this question. Since marriage is a natural institution, it must be taken that those who marry intend the natural union with all its consequences, known or unknown, unless any of these be expressly excluded.

In the second place, the parties must be physically capable of the marriage union. The man must have reached puberty, and the woman must be *apta viro*. A promise to marry might be made earlier, and have some binding force, as in the case of legal espousals *per verba de futuro*, but this promise would not normally constitute marriage, even if the parties afterwards came together. But further, since some men remain always incapable of the act of marriage, or are incapacitated by artificial means, one who is so impotent is incapable of contracting marriage; if the impotence be discovered after the verbal contract has been made, this must be treated as null and void, and there is no marriage.

In the third place, the consent of the parties must be free, deliberate, and informed, otherwise there is no true contract; anything, therefore, which destroys these conditions nullifies a contract otherwise valid. An enforced consent makes no marriage, even though the union be consummated; if either party was terrorized, by whatever means, into the surrender of the body and the verbal expression of consent, the contract is void. An insane person, again, or one under the influence of drugs, not having control of the will, is incapable of contracting a valid marriage. So too if a definite mistake be made as to the persons contracting, as if a man verbally contract with one woman supposing her to be another woman, this contract also is void. These limita-

tions are not imposed by positive human law; they are inherent in the nature of things, rendering an apparent consent unreal.

Fourthly, the parties must both be free of any other tie of wedlock. This follows from the unity and the indissolubility of marriage; a person already married cannot contract a new marriage. It is allowed in practice that when one party of a marriage has disappeared and has not been heard of for some years, the other party may be held free to marry, but this on the ground that the death of the missing one is presumed. It is sometimes held that a precontract of marriage, solemnly made, is a bar to any other marriage unless the parties to it be as solemnly released. This kind of contract is recognized in many systems of law, and has an important place, under the name of *Sponsalia*, in Canon Law and Moral Theology. The question for us here is whether it should be referred to Natural Law. In a sense, Natural Law must certainly take cognizance of it, as of all obligations founded on contract. It is a contract by which the parties, in some cases through their natural or legal guardians, pledge themselves to marry at some future time. It is not denied that the contract is rescindible, either by mutual consent, or even by one party where conditions make its fulfilment improper; but about its effect while subsisting there is much dispute. Each party is under a natural obligation to marry when called upon to do so, and is therefore precluded from contracting any other marriage; but is there set up a natural *status* which will render such marriage void, if attempted? The precontract is the preliminary ἐγγύησις of Athenian law, which was considered an indispensable feature of the marriage contract. In Roman law the *sponsalia* were not essential, and it was possible to proceed direct to marriage; but, both in this system and in the Christian practice derived

from it, these espousals *de futuro* followed by the carnal union of the parties have been held to constitute true marriage. This effect, however, may be referred to a contract of present marriage presumed as implicit in the act of union, and thus it is not necessary to give the espousals the character even of inchoate marriage. On the whole, it seems best to conclude that in the order of nature espousals *de futuro* set up nothing but an obligation, the breach of which is an offence against justice, but which does not render the person so bound incapable of marriage with a third party. The marriage is to be condemned, but is not to be set aside as void.

Lastly, persons nearly akin to each other are incapable of intermarrying. It is not, however, certain what nearness of kindred constitutes a natural bar to marriage. The practice of mankind has varied from a rule of strict exogamy, requiring the parties to be of different tribes, to the point of allowing marriage between a brother and a sister of the full blood. At the same time the observance of whatever rule is adopted has usually been enforced under sanctions which imply a remarkable degree of natural repulsion from the forbidden unions. The definite horror of incest, which seems indestructible even in the most decayed civilization, has its roots deep in human nature. Attempts have been made to find a physiological basis for prohibitions of this kind, but without success; a general belief that injurious effects are found in the offspring of the forbidden unions is not universally verified in experience, and it is probably the result rather of a religious dread than of actual observation. It seems to be a certain conclusion of biology that the human race is descended from a single ancestor differentiated by one of the greater variations that appear spontaneously in breeding. If this be so, the unity of the race could be preserved in the first instance only by the closest

interbreeding, and it is impossible to refer the prohibitions in question to these beginnings. But the natural constitution of society, as we have had occasion to observe, is not to be found in the first stages of human life. It is found rather in that to which human life tends, in accordance with the thought of the Creator. At what stage in the history of the race the restriction of in-breeding began, it is impossible even approximately to ascertain. The savage tribes which practise exogamy, it must be repeated, are not primitive. They have an unrecorded past in which vast changes have probably taken place. But the restriction, in one form or another, has become a constant factor of social order. Marriage with a sister of the half-blood, as recorded of Abraham, or of the full blood as practised in some communities more civilized than those of the Semitic nomads, has been held on high authority to be forbidden by natural law [1]; but it is difficult to maintain this opinion in view of the fact that such marriage would be necessary at the beginnings of the human race; still less will a more remote kinship be a bar; the one kind of union that seems to be certainly excluded is that between a man and a woman related in the direct ascending and descending line. If this be so, and the question is one of great difficulty, all other prohibitions must be referred to human law, being imposed for the better safeguarding of the family.

What has been said above as to the relation of affinity draws with it the inevitable consequence that the natural restriction of marriage applies no less to persons allied in this way than to those related in blood. This obvious conclusion is fortified by the remark of St. Paul that union between a man and his father's wife was regarded, apart from

[1] The authorities are collected with characteristic erudition in the Rev. Father Puller's *Marriage with a Deceased Wife's Sister forbidden by the Laws of God and of the Church.*

any special sanction of Christianity, as a thing not to be heard of.[1] That is to say, it was an offence against natural law and against natural religion.

These five conditions, then, are required for a valid contract of marriage. The parties must intend true marriage; they must be physically capable; they must be acting freely, under no constraint and under no mistake; they must be subject to no previous bond of marriage; and they must not be too near akin.

The contract thus made is fulfilled in the actual union of the parties, which is called consummation of marriage. A man and a woman who have contracted, but not consummated marriage, are in an abnormal position as to which the natural law affords no guidance, but for which human law must provide in case of need. Those who have contracted and consummated marriage enter upon a new state of life, determined by nature. The state of marriage is not a contractual state; the bond is not a contractual bond. The contract is only the instrument by which the state of marriage is brought about. It is not a continuing contract, subject to revision, or capable of being rescinded with due regard for law by agreement of the parties interested. It is completed by consummation. Thenceforward the relations of the parties are determined, not by contract, but by law, divine and human; they are bound to the fulfilment of their mutual duties, not by their own consent, but by a natural obligation.

The extent of the obligation is determined by the purpose of marriage. It is an obligation to live together for life in a perfect union of equal partnership for the procreation and nurture of children, for mutual support and comfort in good and evil estate, and for the right ordering of the family.

[1] 1 Cor. v. 1. The reading *ὀνομάζεται* seems to be a valid gloss, looking back to *ἀκούεται*.

Nature seems to assign a certain headship to the man, which St. Paul with great boldness likens to the headship of Christ in the Church, but this implies no dominion. It is not by natural law, but by a gross corruption of human law, that a wife is regarded as the chattel of her husband. St. Paul qualifies the submission and reverence of the wife by the implication of perfect equality involved in bidding men love their wives as their own bodies. In regard to the essential act of the marital relation, he insists that the wife has the same right over her husband's body that the husband has over the wife. In the First Epistle of St. Peter, the comparative weakness of the woman, though naturally and inevitably pointing to some normal measure of subjection, is expressly made the ground for honourable regard.[1]

The divine law of nature assumes obedience. It is designed for men who live according to the will of the Creator. Sin, and the perversity of nature consequent on sin, disturb the sublime order thus demanded, and there is in the divine law no invocation of force to compel submission. Its sanction is moral; its appeal is to conscience. There are terrors, but remote; there are consequences of ill-doing, but they are obscure in movement. Law is not necessity. Some confusion of thought is induced by the common application of the word to those sequences of cause and effect in which no free action of will is discernible. It may be that we are mistaken in thinking even of wind and storm as fulfilling God's word with lifeless precision; there may be agents working with the thundercloud as men work with the harnessed forces of nature. Where men are concerned there is certainly a measure of freedom, known in act though undetermined in extent. In marriage, therefore, as in all moral action, human practice does but approximate to the perfection of the divine law.

[1] Eph. v. 22–8; 1 Cor. vii. 4; 1 Pet. iii. 1–7.

That law may be known by interrogation of nature. But the knowledge so achieved is imperfect, being at the best sought by long labour and preserved in the accumulation of human tradition. It is also precarious, being partly obscured and partly distorted by passion and self-will. It is increased, and it is also cleared of false accretions, by the plain teaching of the Gospel, in which God Himself makes known some of the more secret passages of His Will. Christians therefore have in the tradition of the Church a fuller exposition of the divine law of marriage, as it is in the order of nature, than can be found elsewhere. Christian marriage is not a particular kind of marriage, though there is superadded to the marriage of Christians a certain quality, next to be considered, by which it becomes sacramental. There is not a less perfect marriage common to all men, and a more perfect marriage proper to Christians. Marriage is true marriage alike in the Christian, in the pagan, and in the creedless theist or atheist who has renounced Christianity. In so far as marriage is better ordered in Christendom, it is only as Christians know and observe more fully than other men the natural law of marriage. In so far as modern civilized man has any advantage, it is because he has acquired, from theology and physiology alike, more insight into the working of nature. To break away from the Christian tradition is not to return to nature; it is to fall back upon a less-developed knowledge of nature.

The duty of a Christian man is plain. He is to bring his conscience to bear upon what he knows of the divine law, and to regulate his own conduct thereby. He is to contract marriage only as it is allowed by the law of God, and to live in this holy estate as becomes one who has learnt its deeper meaning. He will bear in mind the purpose of the union, and will do nothing to frustrate that purpose by interference with the course of nature; he will beget chil-

dren and cheerfully undertake the burden of their nurture. He will make a temperate use of marriage, and will be sparing in his demands upon his partner. He will treat that partner with equal honour both in public and in private, and share as completely as possible all good and adverse fortune.

The duties of husband and wife are correlative, and each has to contribute in equal measure to the achievement of a perfect marriage. But the instructed Christian has to do more than present an example of the life that is according to nature in a single family. Human life is necessarily organized on a large scale. The Christian has to maintain the cause of marriage in the nation as well as in his own household. His conscience is not engaged in what other men do, but he is bound both to support others in doing right and in upholding the general good of society. Knowing the importance of marriage, he will do his utmost to prevent its degradation. But he will remember that all men have not the same knowledge, that many defects in the ordering of this holy estate are to be tolerated because of their ignorance or the hardness of their hearts. He will not be too ready, either by legislation or by pressure of social opinion, to force on other men observances to which their own conscience does not call them. He will be much sterner in his judgment of a fellow Christian than in his intercourse with those without the Church. He will bring all things to the standard of the law of God, refusing to abate any demand, or to recognize any lower ideal; but he will allow that personal deflections from the right way do not always involve personal guilt. In a word he will uphold the truth of nature, but in social intercourse he will tolerate much that is false, and will frankly recognize as living together in good faith and without blame many whom he knows to be united by no true marriage.

CHAPTER II

Of Marriage in the Order of Grace

IN the ritual of the Church, marriage is said to be ordained for a remedy against sin. This seems to conflict with the statement that it was instituted in the time of man's innocency, except on the general understanding that by the economy of grace things existing in the order of nature are appropriated to an use beyond nature. If sin be a perversion of man's nature so grave and harmful that he cannot by the exercise of his natural powers recover his normal condition of spiritual health, it follows that he can be restored only by some power external to himself. The practical purpose of the Christian revelation is to show a power so working, which we call the Grace of God; and since this exceeds the measure of man's natural power, we call its operation supernatural. But the work is usually done by means which lie within the order of nature. The Saviour of the world took human nature in which to do the work of redemption, and took it by means in part, at least, natural. "Si enim consideremus," says St. Thomas Aquinas, "id quod est ex parte materiae conceptus, quam mater ministravit, totum est naturale."[1] In sequence upon this, institutions and practices which formed part of the common equipment of human life were taken into the redemptive system of Christianity and established as "mysteries of God." All forms of religion, all modes of

[1] *Summ. Theol.*, 3, 33, 4.

social action, were more or less tainted with the effects of sin; but some of them were sanctified to be modes of the Christian life and forms of the religion of the Gospel.

Among these was marriage. Constituted in the order of nature, and remaining as so constituted, it received in addition a supernatural endowment. "This mystery is great," says St. Paul.[1] According to his constant use of the word, he is thinking of a dispensation of God, eternal in the divine purpose, but coming to light only in the preaching of the Gospel. The ordinance of nature, "the two shall become one flesh," is made an ordinance of grace; "I speak," he adds, "in regard of Christ and of the Church." So sacred has the natural union become, that a husband's love for his wife may be compared with the love of Christ for His redeemed; men ought to love their wives as their own bodies, and as Christ loves His mystical Body, the Church. The figure had already been used by the prophets to illustrate the relation of God to His chosen people[2]; St. Paul employed the comparison rather to enhance the solemnity and sanctity of the estate of marriage.

The sense in which he used the word μυστήριον must be ascertained. It is not peculiar to him, though the word is barely found in other writers of the canonical books of the New Testament. It was evidently part of the common Christian language, and so continued. But, like almost all specifically Christian words, it came from an exterior source. It had a familiar religious use in all lands where Greek was spoken. Its origin was religious, though it was passing into a sense detached from sacred associations. Throughout the Greek world, and especially the part of it in touch with Asia, *Mysteries* were religious observances connected with the idea of redemption or salvation by means

[1] Eph. v. 32. [2] Jer. iii. 14; Hos. ii. 19.

of a doctrine divinely revealed and practices divinely ordained. Their resemblance to the Christian system is obvious, and the first preachers of the Gospel did not shrink from the comparison. They proclaimed the kinship by speaking of the Christian Mysteries. But there is a difference. Christianity was more than a specific religious action; it demanded the surrender of the whole life, and all the details of life could be taken up into its mysteries.

It is possible that St. Paul himself was responsible for the general currency of the word among Christians. It seems to have been disliked by the Jews. Philo insisted that there were no mysteries in the Mosaic religion, which employed only the most open and public methods of divine worship. He evidently had in view the affected secrecy of the mystic rites, and their restriction to chosen initiates.[1] The word found only a restricted use in the Septuagint, mostly in the vulgar sense of a mere secret. In the Book of Wisdom, the Mysteries of God are but the unsearchable workings of Providence. It does not seem to be used of religious ordinances except in another passage of the same book, where it stands, not without a note of contempt, for the vain imaginations of the Gentile world.[2] It is therefore surprising to find the word current in the Apostolic writings; but however much its complete adoption into Christian language may be due to St. Paul, his free use of it without apology or explanation shows that it was already sufficiently familiar.

Nor is the word used loosely, without reference to its origin. It had already passed, as the Septuagint bears witness,[3] into the vulgar sense of a mere secret, but St. Paul

[1] Philo, Περὶ θυόντων, p. 856, ed. 1691.

[2] Wisd. ii. 22; xiv. 15, 23. Cp. Dan. ii. 18; Judith ii. 2; Tobit xii. 7.

[3] And earlier; cp. Menander, *Fragm.*, 168. μυστήριόν σου μὴ κατείπῃς τῷ φίλῳ.

does not seem to use it anywhere in this way.[1] There are not many indications even of a secondary sense of secrecy. The Christian Mysteries had affinities with the cults known by the same name in other religions, but they were not guarded with the same affectation of secrecy, nor were sacred truths jealously doled out to recipients in various stages of initiation. There are, indeed, some words of St. Paul which seem to imply such a practice: "We speak wisdom among the perfect. . . . We speak God's wisdom in a mystery."[2] But it is probable that, borrowing the language of secret initiation, he is here thinking only of the gradual training in the Christian life which new converts required; he reproaches the Corinthian Christians for their slow progress. In the course of time, indeed, the habit of secrecy invaded the Christian Church; the *disciplina arcani* may have been suggested as much by the associations of the Greek Mysteries as by the necessity of hiding from persecution. But in the first age the Christian Mysteries seem to have lacked the element of secrecy. There is evidence of this in the use of the Latin word *sacramentum*, which suggests nothing of the kind, to represent the Greek μυστήριον. The earliest translators of the Scriptures of the New Testament employed it exclusively; the word *mysterium*, though well established in the language, and afterwards introduced by St. Jerome into his revised text of the Bible, was for some reason avoided; no word implying secrecy was sought; the Christian mysteries became, for the whole Latin Church and its derivatives, *sacramenta*.

This rendering helps to fix the meaning of the original. The older Latin literature, indeed, knows no use of the word

[1] There is more in Eph. i. 9, though the sense of secrecy is there prominent.

[2] 1 Cor. ii. 6–7. Account should, however, be taken of our Lord's comment on His parabolic teaching; Matt. xiii. 14.

which accounts for its Christian use, and it was probably drawn from the popular language. Tertullian and St. Cyprian employ it in a very broad sense for the Christian religion in general, as well as in a narrower sense for specific religious observances. St. Augustine seems in more than one place to make it exactly equivalent to *signum sacrum*, and this interpretation, treated as a definition in the form *signum rei sacrae* had considerable effect on the development of Latin theology. It is probable that the sense of *signum* was present, though less prominent, in the original Greek word as used by Christians ; a mystery was something done or said with a spiritual significance. More broadly, it was any religious observance, whether of doctrine or of practice, closely connected with the evangelic scheme of salvation.

When marriage thus became a sacrament, its original character was not changed ; a new quality was superadded. It became, says St. Augustine, " non solum vinculum, verum etiam sacramentum," with the result that things formerly tolerable in its treatment were now intolerable ; for instance, the lending of a wife to another man, which was reckoned praiseworthy in Cato.[1] This can only mean that the sanctity of the relation between husband and wife was increased. The selection of such an extreme case for illustration shows how the degradation of marriage in Roman practice affected St. Augustine's estimate of the natural union ; he seems to have thought that, but for the sacramental character newly impressed upon it, such use of a husband's rights would not have been blameworthy. By the same habit of thought, perhaps, he was led to regard the sacramental character of marriage as the cause of its indissolubility. In saying that marriage would not be indissoluble, " nisi alicujus rei majoris quoddam sacramentum adhiberetur," [2] he may possibly

[1] *De Fide et Operibus*, 7. [2] *De Bono Coniugali*, 7.

have meant that from the first the value of the institution stood in the anticipation of its evangelic significance ; but this, though in agreement with much of his thought, conflicts with some of his express statements. He was not, however, as we have seen, entirely consistent with himself on this subject.

The " greater thing " present to the mind of St. Augustine was unquestionably the union of Christ and the Church, with which St. Paul compares the union of husband and wife ; as the English ritual says, God has " consecrated the state of matrimony to such an excellent mystery, that in it is signified and represented the spiritual marriage and unity betwixt Christ and His Church." But this is not the primary sense in which marriage is sacramental. A sacrament is symbolic ; but it is not a sacrament because it is symbolic ; it is symbolic because it is a sacrament. The mysteries of the kingdom of heaven have transcendent counterparts, but in their primary sense they are religious doctrines and practices connected with the work of men's salvation under the existing conditions of human life. The sacrament of marriage is an ordinance of practical Christianity.

By practical Christianity men are saved from sin. The ordinances of practical Christianity are means of salvation. What men sought by means of the Mysteries of Eleusis they obtain by means of the Christian Mysteries. In the broadest sense of the term, sacraments are means of grace. In Hooker's phrase, they are " powerful instruments of God to eternal life " ; not physical instruments, as he well distinguishes, but " moral instruments of salvation, duties of service and worship, which unless we perform as the Author of grace requireth, they are unprofitable." [1]

His general definition of the term can hardly be improved : " A *sacrament* is generally in true religion every admirable

[1] *Eccl. Pol.* v. 50, 57.

thing which divine authority hath taught God's Church either to believe or observe, as comprehending somewhat not otherwise understood than by faith." [1] For many ages no attempt was made to determine more particularly what beliefs or practices should be recognized as Christian sacraments; *seven* were specifically enumerated by Peter Lombard in the twelfth century, and the great vogue of his *Liber Sententiarum* in the schools of the Middle Ages made this number a theological commonplace. The narrowing of the term was due to the dominance of the idea of *signum*. A sign was reasonably interpreted as something visible, and those sacred ordinances in which there could be recognized a visible sign of sanctifying grace were distinguished as Christian sacraments in the more proper sense. This new use of the term was arbitrary, but the distinction which it enforced was real. So accurately and convincingly was it treated that even the Greeks, never too ready to follow Latin theologians, adopted the scheme; the word μυστήριον could not be limited in use, as was soon the case with the Latin *sacramentum*, but the Seven Holy Mysteries were set in a category apart. Thus the determination of seven sacraments, peculiarly so called, was accepted by the whole Christian Church. Marriage is one of the seven.

But did St. Paul call marriage a *mystery* in this sense? The word has with him a latitude which would permit a more general interpretation: did he mean that in marriage is conveyed a gift of grace, saving or sanctifying? His gnomic saying must be interpreted chiefly by what he says elsewhere of marriage and its effect in the Christian life, which we shall presently examine; but the saying itself will yield some information. The words τὸ μυστήριον τοῦτο μέγα ἐστίν are significant. They may be compared with the similar phrase, μέγα ἐστὶ τὸ τῆς εὐσεβείας μυστήριον.[2]

[1] *Eccl. Pol.*, App. I, 14. [2] 1 Tim. iii. 16.

In each case the wording recalls the familiar distinction of the Hellenic Mysteries into *μεγάλα* and *μίκρα*, and it is difficult to believe that St. Paul had not this in mind. It will then follow that marriage, no less than the Incarnation, is to rank among the Greater Mysteries of the Christian faith. Moreover, it is clear that in so placing it he was on familiar ground. The ritual of marriage among the Greeks was already assimilated to that of the Mysteries. It is found, for example, that the mystic formula, *ἔφυγον κακὸν εὗρον ἄμεινον*, quoted by Demosthenes in the course of his bitter gibes at the former occupation of Aeschines,[1] was used also in the ceremonies of marriage ; both rites, it has been said, " might be viewed as transitions from an old life to a new one presumably better, processes in which the initiate renounces or dies to the old and is reborn in the new." The idea of marriage as an escape from evil, we shall see, was definitely present to St. Paul's mind. It cannot be doubted that his words about the Great Mystery—I quote the same writer—" were in accordance both in spirit and in verbal form with earlier Hellenic religious custom rather than with Hebraic." [2] There is therefore no forcing of his language when we take him to speak of marriage as a mystery, not merely in some wide and general sense, but in the special sense of a sacrament which is a vehicle of divine grace.

Regarded in this light, as a visible sign of grace, marriage is the natural institution, remaining in its own nature, but raised to a supernatural potency. The institution consists, as we have seen, in a contract and its fulfilment. The mutual surrender of man and woman, and the mutual acceptance of that surrender, sufficiently constitute the sacrament. But the distinction of *matter* and *form*, introduced by theologians of the thirteenth century from the Peripatetic philo-

[1] *De Corona*, 313.

[2] Farnell, *The Higher Aspects of Greek Religion*, pp. 33–4.

sophy, has here raised some unnecessary questions. The solution usually adopted finds the matter of the sacrament, or its indeterminate element, in the mutual surrender of the bodies of the parties contracting, while the determining form is sought in the express words by which the contract is declared. The insistence of Canonists on *verba de praesenti* fits in with this distinction. It is a perfectly sound refinement, even if it be unnecessary; for the surrender of the body is common alike to marriage and to illicit intercourse, and the intention which makes it marriage cannot be adequately expressed without words or their equivalent. An alternative opinion, however, finds the matter of the sacrament in the surrender of the body on either side and the form in the acceptance.[1]

A sacrament implies a rite. What is actually essential for marriage, it will be seen from what has been said, is a very simple formula of mutual consent. But the Church has surrounded this with sacred observances, partly intended to secure due publicity, partly designed to enhance the dignity and solemnity of the act. The origin of this ritual cannot be traced, but a certain negative conclusion is possible. If a ceremonial of marriage had been adopted for general observance in the first age, it cannot be doubted that some definitely Jewish features would have been woven into it, as into other primitive rituals, and these would have survived or left traces in later growths. But there is nothing of the kind. On the contrary, the ritual of marriage that was finally adopted by the Church seems to be of purely Roman origin. The conclusion is inevitable, that existing ceremonies of marriage were as far as possible accepted and con-

[1] Billuart, *Summa Summae*, vol. vi, p. 345. He argues ingeniously from the nature of a contract in general, that an offer of anything is formless and inderteminate, until it is clenched by acceptance.

tinued among Christians ; what was inconsistent with Christian belief and practice was retrenched, a Christian feature was in some cases substituted for something intolerable, what seemed innocent was retained. The immense extension of Roman citizenship in the third century made Roman observances general, and a fairly uniform mode of Christian marriage was the result.

The earliest evidence on the subject is found in the writings of Tertullian. He extols the happiness of a marriage arranged by the Church, confirmed by Sacrifice, sealed by Blessing, proclaimed by Angels, ratified by the Father. Elsewhere he mentions the nuptial veil, and the joining of hands.[1] St. Gregory Nazianzen speaks of the joining of right hands by a bishop ; St. Ambrose of the " sacerdotal veil and benediction " ; St. John Chrysostom of the ceremonial crowning, still retained in the East, and of " lacing the union with prayers of blessing " ; the *Statuta Antiqua Ecclesiae* of the presentation of the parties by parents or *paranymphi*, to be blessed by a priest.[2]

These references are vague, but they are illustrated by forms of benediction contained in the most ancient extant Sacramentaries. The Leonine, the Gelasian, and the Gregorian have a Nuptial Mass, with the usual variants, and a long eucharistic prayer of the ordinary type, to be said after *Pater Noster* before the Fraction. It is noteworthy that the offering is made for the bride, and for her alone. These are not found in books of the Gallican rite, but Duchesne is of opinion that the short benediction *Deus Abraham*, said before

[1] *Ad uxorem.* ii. 9. " Unde sufficiamus ad enarrandam felicitatem matrimonii quod ecclesia conciliat, et confirmat oblatio, et obsignat benedictio, angeli renuntiant, Pater rato habet ? " Cp. *De Veland. Virgin.* 11.

[2] Greg. Naz. *Ep.* 193 ; Ambrose, *Ep.* 19, § 7 ; Chrysos. *Hom.* 9 *in* 1 *Tim.* ; *Hom.* 48 *in Genes. ad fin.* But he rather advocates this than treats it as usual or necessary.

Ite missa est in the Roman rite, is derived from a Gallican source. The Sacramentary of Bobbio has a *benedictio thalami*.[1]

It is not until the ninth century that we find a detailed account of nuptial ceremonies. In his *Responsa ad Bulgaros* Nicholas I sets out the mode of celebrating marriage, "quem sancta ecclesia Romana suscepit antiquitus."[2] There is good reason for believing that he was justified in asserting this, for in spite of some references to the Old

[1] Duchesne, *Origines du Culte Chrêtien*, ch. xiv.

[2] "Post sponsalia, quae futurarum sunt nuptiarum promissa foedera, quaeque consensu eorum qui haec contrahunt, et eorum in quorum potestate sunt, celebrantur, et postquam arrhis sponsam sibi sponsus per digitum fidei a se annulo insignitum desponderit, dotemque utrique placitam sponsus ei cum scripto pactum hoc continente coram invitatis ab utraque parte tradiderit, aut mox aut apto tempore, ne videlicet ante tempus lege definitum tale quid fieri praesumatur, ambo ad nuptialia foedera perducuntur. Et primum quidem in ecclesia Domini cum oblationibus, quas offerre debent Deo per sacerdotis manum, statuuntur, sicque demum benedictionem et velamen caeleste suscipiunt, ad exemplum videlicet quo Dominus primos homines in paradiso collocans benedixit eis dicens, Crescite et multiplicamini, etc. Siquidem et Tobias, antequam coniugem convenisset oratione cum ea Dominum orasse describitur. Verum tamen velamen illud non suscipit qui ad secundas nuptias migrat. Post haec autem de ecclesia egressi coronas in capitibus gestant, quae semper in ecclesia ipsa sunt solitae reservari. Et ita festis nuptialibus celebratis, ad ducendam individuam vitam Domino disponente de cetero diriguntur. Haec sunt iura nuptiarum; haec sunt, praeter alia quae nunc ad memoriam non occurrunt, pacta coniugiorum sollemnia. Peccatum autem esse, si haec cuncta in nuptiali foedere non interveniant, non dicimus, quemadmodum Graecos vos astruere dicitis, praesertim cum tanto soleat arctare quosdam rerum inopia ut ad haec praeparanda nullum his suffragetur auxilium; ac propter hoc sufficiat secundum leges solus eorum consensus de quorum coniunctionibus agitur. Qui consensus si solus in nuptiis forte defuerit, cetera omnia etiam cum ipso coitu celebrata frustrantur, Joanne Chrysostomo magno doctore testante, qui ait, Matrimonium non facit coitus, sed voluntas."

Testament, the order of proceeding is exactly that of the most solemn kind of marriage known to the ancient Roman law, or *Confarreatio.* Abandoned by almost all others before the end of the second century, this solemnity seems to have been continued, with the necessary modifications, in the Christian Church. We observe a twofold ceremony. First, the espousals (*sponsalia*), or solemn promise of future marriage, and secondly the actual nuptials. With the espousals are connected the *arrhae,* or earnest of the community of goods that marriage would bring, consisting of a ring placed by the bridegroom on the bride's " faith finger," and the delivery of the act of dowry in writing. There is nothing to show that this was done elsewhere than at home, or that the assistance of a priest was required. The nuptial ceremony, on the contrary, is performed in church, and not without a priest ; it has three features, (i) the oblation or eucharistic sacrifice, in which the espoused take part, (ii) the benediction pronounced while the nuptial veil is spread over the bride, and (iii) the crowning of the married pair with crowns usually kept for that purpose in the church.

This procedure follows exactly that of the ancient *Confarreatio,* in which the espoused assisted at a sacrifice and partook of the *panis farreus,* prepared and consecrated for the purpose. But this solemnity was never held necessary for a valid marriage in Roman law, and the Pope insists that neither shall its Christian counterpart be reckoned essential. He protests against the alleged teaching of the Greek Churches that the omission of it was sinful, definitely excuses those for whom it was too costly, and affirms the validity of a marriage contracted by mutual consent alone. No ceremony, he adds, can make a marriage good, when that consent is lacking.

This became the constant doctrine of the Western Church. But it will be observed that no mention is made here of a

renewal of consent at the time of the nuptials. The consent of the espousals was *de futuro*, and this, we have seen, is imperfectly binding, and does not constitute true marriage. Does the conditional contract of espousal become absolute when the nuptial benediction is received, without any further expression of consent? The question was much debated during the next two centuries, and was complicated with that of a theory concerning the sacrament which first appears in the writings of the contemporary of Nicholas, Hincmar of Reims. According to him, marriage became complete only on consummation; the contract was a preliminary, setting up an obligation, but one that could be rescinded; the sacrament of indissoluble marriage came into being only with consummation. Gratian accepted this, with some safeguards, and the school of Bologna followed him. Peter Damian, Hugh of St. Victor, and Peter Lombard, maintained the contrary proposition that *consensus facit matrimonium*, and the influence of the schools of theology at Paris caused this to prevail. As a by-product of this controversy emerged the contention that the true contract of marriage must be *per verba de praesenti*, and the contract of espousal was thenceforward distinguished as being made *per verba de futuro*. As a further consequence, it became general to simplify matters by doing away with the interval of time between espousals and nuptials, and the contract of espousal was effected at the church-door, immediately before the benediction. The requirement of a contract *de praesenti* was met in many Churches by an addition to the older form of espousal. According to the Sarum Manual, which is closely followed by the modern English rite, the priest first put the question, "Wilt thou have this woman to thy wife?" with the addition of words setting out the duties of the holy estate. The question was repeated, with variations, to the woman, and both parties replied, "I will." This was the

contract *de futuro*. Then followed words *de praesenti*: "I, N., take thee, N., to my wedded wife," with similar amplification. At Rome, however, these additions were not received, and the ritual to this day has only the demand put to the parties, with the answer, "Volo." In view of the fact that the nuptial benediction is to follow at once, it is possible to read into this, says Duchesne, the meaning of a contract *de praesenti*;[1] but it can hardly be doubted that we see here a survival from a time when the promise of espousal was held to be sufficiently ratified, even after a considerable delay, by the nuptial ceremony following.

It follows from all this that the one essential rite for the sacrament of marriage is the consent of the parties, expressed either by actual words *de praesenti* or by some formula of agreement on which the same quality is impressed by concomitant circumstances. The ceremonies by which this necessary act is accompanied are intended only to augment its solemnity, and may be varied or omitted. The veiling of the bride gave place at an early date to the practice of holding a pall over the united pair, of which vestiges only remain in some places; the crowning, retained in the East, has long since disappeared in the West. The modern use of veils and garlands has no religious signifi-

[1] Duchesne, *loc. cit.* "La cérémonie nuptiale comprend actuellement les rites des fiançailles aussi bien que ceux du mariage proprement dit. Elle commence par la déclaration du consentement, qui, le mariage devant être célébré sur l'heure, a maintenant le caractère d'un engagement *de praesenti*. Les parties, interrogées par le prêtre, expriment publiquement leur intention de s'unir en mariage." The author adds a note: "On a placé là, au moyen âge, la formule *Ego coniungo vos in matrimonium*, etc., qui est, comme on le voit, une sorte d'interpolation de la cérémonie primitive. Cette formule, dont le sens littéral est excessif, n'a pas peu contribué à fausser les idées sui la nature du mariage religieux, et à faire croire que le lien matrimonial dérive de l'autorité du prêtre." See below p. 162.

cance, though it illustrates the persistence of customs no longer prescribed by authority. The place of the benediction has varied. The Roman rite has three benedictory prayers, one at the espousals, another after *Pater noster* in the Mass, the third before *Ite missa est.* In the churches of the Gallican rite, the nuptial benediction seems to have been either entirely detached from the Mass, or given after Communion. The English rite of 1549, closely following that of the Sarum Manual, had a benedictory prayer and a blessing at the espousals, with three more prayers and a second blessing said at the altar before the beginning of Mass, and this arrangement has been retained in subsequent revisions.

Such being the external features of the rite, and its concomitants, it remains to determine the quality of the sacramental grace of marriage.

It has been reduced to a mere permission of the carnal act. "Because of fornication," says St. Paul, "let each man have his own wife, and let each woman have her own husband." [1] Commending virginity as preferable, he allows marriage on account of human weakness. The English ritual puts this forward as a cause for which marriage was instituted. "It was ordained for a remedy against sin, and to avoid fornication; that such persons as have not the gift of continency might marry, and keep themselves undefiled members of Christ's body." But if this be taken to mean merely that an act which would be sinful apart from marriage is permissible in marriage, there is no addition of sacramental virtue, since this is the effect of marriage in the order of nature. A further effect is therefore sought in the restraint of appetite; the grace of marriage is that more temperate use of the body which should distinguish those who profit by its working. But this is to halt un-

[1] 1 Cor. vii. 2.

reasonably ; for, as St. Thomas says, the effect of grace is not only to restrain men from sin, but also, and simultaneously, to impel them to good.[1] He therefore adds that the grace of marriage aids men in the performance of all things which they undertake in the married state ; their undertaking is expressly approved by God, and therefore, as in the case of those promoted to holy orders, a special grace is given enabling them to fulfil their purpose according to the divine will.

This may seem sufficient, but it is rather frigid as an account of sacramental grace. The comparison with Holy Order is defective, for the sacred ministry is itself a purely Christian institution, designed expressly and solely as a part of the work of redemption ; there is, therefore, obvious need of a supply of grace enabling the recipient to comport himself in all things as the representative of Christ. But marriage belongs to the natural order. According to analogy we should expect to find the ability requisite for the fulfilment of its ends supplied by God's providence in the same order. Marriage is ordained for the preservation of the species, as sleep for the preservation of the individual ; so far as their proper use is concerned, there seems to be no more need of a special sacramental grace in the one case than in the other. As a mystery of man's redemption, marriage should mean more than a strengthening and refining of domestic ties.

What we seek may be found in St. Paul's comment : " It is better to marry than to be inflamed." [2] Marriage is not only an escape from the danger of actual fornication,

[1] *Sum. Theol.*, Suppl., 42, 3.

[2] 1 Cor. vii. 9 πυροῦσθαι. Compare 2 Cor. xi. 29, where the word is used of passionate grief or indignation ; Eph. vi. 16, where the " fiery darts of the evil one " are temptations caused by the stirring of the passions ; 2 Macc. iv. 38, x. 35, xiv. 45.

though in such a society as that of Corinth it might be almost universally necessary on that account. Virginity or widowhood is the better way, but there are perils besetting those who choose it. To live rightly in this state, a man must have a strong hold on his appetites and passions, the virtue of ἐγκράτεια, or continence. This exists as a natural virtue, highly prized by ethical philosophers; it exists also in the supernatural order, being one of the fruits of the Spirit.[1] Those who have this power by nature, and those to whom God gives it by grace, are capable of the higher life to which St. Paul himself was conscious of being called, and to which he invited others: "I say to the unmarried and widows, it is good for them if they remain as I do." But he took it for granted that in either sex such were few. Most men and women, attempting this, would be inflamed by passion; the natural impulse of procreation would be strong in them, producing serious moral disorder if it were not allowed its course. The truth of his observation is well established by experience. But it is equally certain that mere indulgence of appetite will not check this disorder; it may give relief for the time, affording an outlet, but the appetite is strengthened by gratification. Even marriage, in the order of nature, is no remedy. It may be a palliative. The marriage bond imposes a check on the wandering of desire, and those who honestly abide by it gain the advantage of an external control; but the rights of marriage may be abused by excess, and become the merest excuse for lustfulness. The morbid inflammation of desire is the same thing, whether it be caused by denial of gratification or by indulgence. Grave pollution of soul is found at either extreme.

This morbid inflammation is concupiscence. It is an impulse to perform the sexual act merely for the gratifica-

[1] So St. Paul says in Gal. v. 23.

tion of sense. As a fully developed vice of nature, it seems to be peculiarly human; there are obscure traces of it in some of the lower animals, which point to its origin from a variation of the true natural instinct; but as a rule in all other animals the sexual act is strictly controlled by the course of nature, and directed to the end of propagation. Concupiscence would therefore seem to be one of the consequences of human freedom. Man has risen above the environment of irresistible instinct, to live under a moral law which he can defy. He is capable of sin. St. Paul was expressing this, in accordance with his proper cast of thought, when he said that through law comes knowledge of sin.[1] The motions of concupiscence are not properly sins, being independent of the will; but they are the result of sin and the cause of sin, and therefore they may be called sinful lusts of the flesh.

The sacrament of marriage is proposed as a remedy for these evils. It is better to marry than to be inflamed. Marriage in the order of nature will not have the effect desired; the grace which it brings when raised to a supernatural potency must be recognized as the cause of deliverance. Marriage is a sacramental instrument of grace, and therefore a moral instrument; its effect will depend upon a right use. The right use of it should extinguish the fire of concupiscence. St. Paul acknowledges that the married who abstain from the use of marriage will probably fall into the peril of incontinency. Speaking of it as he does, he can hardly have in view the risk of adultery; he commends such abstinence by mutual consent, for a season of devotion, but advises a return to the use of marriage, "lest Satan tempt you through your incontinency";[2] he evidently refers to the secret and interior injuries to the soul

[1] Rom. iii. 20; cp. vii. 7–13. [2] 1 Cor. vii. 5.

resulting from the morbid inflammation which the use of marriage is to heal.

There is thus given by marriage grace to extinguish the flames of concupiscence. Those whom God calls to the exceptional state of virginity receive the special grace of continence; to the rest of mankind is proposed the ordinary grace of marriage, directed to the same end, the production of the supernatural virtue of chaste living. By reason of its sacramental efficacy, marriage is not less chaste than virginity.

The sacrament of marriage is therefore the natural institution raised to a supernatural potency for the conveyance of divine grace delivering men from the fire of concupiscence and producing chastity of soul and body. Being in the order of redemption, it is peculiar to Christians; it exists only in those whom baptism, the *ianua sacramentorum*, has brought into the state of salvation. It is thus seen that the baptism of the parties, and nothing else, makes the difference between the marriage in the order of mere nature, which is no sacrament, and the marriage in the order of redeemed nature, which is raised to sacramental efficacy. From this two consequences flow.

In the first place, there can be no marriage between Christians which is not sacramental. Attempts have been made to distinguish between the contract and the sacrament, as though something separable were added to the natural contract, which might be withheld. Thus Billuart [1] argued that, as the washing of the body with water without a sacramental intention does not constitute baptism, so a matrimonial contract entered upon without such intention, though valid as a contract, does not constitute the sacrament of marriage. But the analogy is defective. For the outward act, to which is annexed the sacramental effect of

[1] *In Suammm S. Thom.*, iii, Dist. i, art. 5, § 5. See p. 195, *infra*.

baptism, is not mere ablution; it is ablution performed as a sacred act with invocation of the Name of God. This act cannot be severed from its sacramental efficacy. The excellent principle was first laid down expressly by Bellarmine and is now universally accepted, that it is not necessary to intend the specific effect of the sacrament, or to believe that it has such effect; it is enough to intend to do what the Church does, in other words, to perform a certain sacred action proper to Christians. It is even held, on the highest authority, that a negative intention, if it take the form only of intending not to produce the sacramental effect, does not nullify the sacrament, since human perversity cannot vary the effect of God's ordinance of grace; the only negative intention that can render void the act of baptism normally performed is an express intention not to do what the Church does, or not to baptize in the Christian sense. In the case of marriage, the act which is thus to be estimated is not a specifically Christian act newly instituted; it is continued in Christianity from the order of nature; those who intend to contract matrimony in the order of nature intend to do what the Church does, and they have no power to detach from that act the sacramental efficacy conferred upon it by God. It has even been suggested that baptized persons professing to contract matrimony with the express intention of excluding the sacramental effect would not in fact make a valid contract, since they would be attempting to do this under impossible conditions;[1] but this seems unreasonable, since they would certainly be intending true marriage, though ignorant of one of its necessary implications. The conclusion stands firm, though without this perverse corollary, that in the marriage of Christians contract and sacrament are inseparable. They are distinguishable in idea, but not in fact.

[1] De Smet, *De Sponsalibus et Matrimonio*, p. 119.

In the second place, when married persons become Christians, their marriage at once becomes sacramental. It need not be renewed, no fresh consent being required. Having made their contract of mutual surrender, and having fulfilled it, they cannot enter upon any new contract to the same effect. They are already naturally one, with that union to which God has given sacramental efficacy. The obvious objection that unbelievers are in some sort made recipients of a sacrament, is admirably answered by St. Thomas Aquinas. Marriage, he says, was instituted by God, not exclusively as a sacrament, but also for the service of nature; and therefore unbelievers, though they have no part in marriage as ministers of a sacrament, have a part in it in so far as it serves nature; and even their marriage, though not actually a sacrament, because not contracted in the faith of the Church, has in it that which may become a sacrament.[1] The order of nature is not to be too violently separated from the order of grace; what these two persons have done in the one order has an inherent capacity for energizing in the other.

But what is the case if one party be converted? It is argued that here the sacrament does not come into being, since the bond is the substance of the sacrament, and this must be identical in the two parties who are conjoined; therefore, while the one party remains unbaptized and incapable of the sacrament, the other party also remains without it. The reasoning is ingenious, but it conflicts with the teaching of St. Paul. Dealing with the case in

[1] "Matrimonium non est tantum institutum in sacramentum, sed etiam in officium naturae; et ideo quamvis infidelibus non competat matrimonium, secundum quod est sacramentum in dispensatione ministrorum consistens, competit tamen eis, inquantum est in officium naturae: et tamen etiam matrimonium tale est aliquo modo sacramentum habitualiter, quamvis non actualiter, eo quod actu non contrahunt in fide ecclesiae." S. T. *Suppl.* 59, 2, 1

question, he wrote : " The unbelieving husband is sanctified in the wife, and the unbelieving wife is sanctified in the brother." [1] But if the married man or woman who enters the covenant of grace by baptism receives not only a personal gift of sanctification, but a gift which abounds even to the unbelieving party, how can this be except by virtue of the sacramental bond uniting them ? It would be unreasonable that a Christian should be called upon to live in marriage without the sacramental grace of marriage, and according to the Apostle he not only has this himself, but some share in it is extended to the partner of his natural life. St. Augustine evidently so understood St. Paul, for we have seen that he held this marriage indissoluble, holding also that indissolubility depends on the sacramental character of marriage.

By parity of reasoning the sacramental quality is found also in those marriages, rarely permissible, which are contracted by a Christian with an unbeliever.

By the impress of this sacramental character the sanctity of marriage can hardly be said to be enhanced, since it is already complete. Still less, if we may venture to part company with St. Augustine, is the obligation increased. But the institution is brought more obviously within the ambit of religion, and violation of the bond takes a particular colour of sacrilege. Moreover, neglect of marriage, or its discouragement, becomes more blameworthy. If in the natural order men ought to marry with a view to the fulfilment of the divine purpose by the propagation of mankind, much more is this desirable in the order of grace where additional benefits are dispensed to the individual soul. Artificial restraint on marriage, difficulties created by social conventions, by unequal distribution of wealth and by unwillingness to face the responsibilities of parentage, are seen to endanger the welfare of the race ; professors of

[1] 1 Cor. vii. 14.

eugenics complain that they tend to reserve the task of reproduction to the more reckless and incompetent; from the Christian point of view they seem equally mischievous as depriving souls of the succours of grace. Barriers still more artificial, but more justifiable, have the same dangerous consequences. It may be desirable, it may even be necessary as noted above, to restrain from marriage those who would abuse the holy estate, and whose progeny would be a social pest; but such restriction calls for the greatest caution, lest individuals be unduly sacrificed to the general good; persons denied the benefits of marriage need other help, and the most careful guardianship. It is the will of God that men should find in marriage the remedy against sin which they need the more as they are morally weak. The life of virginity is for those who are called to it by God, whether in religion or in obedience to obvious dictates of nature. For them other succours are supplied; for the generality of men and women, marriage is the way of safety. Mistakes have worked disaster. The bold and generous attempt to demand a celibate life from all admitted to the sacred ministry, pressed by the Western Church from early days, has had some deplorable results; its unwisdom has at times been admitted in the highest quarters. The Eastern Churches frankly abandoned the effort from the time of the Council in Trullo, even blaming the zeal of the Latins, and in the sixteenth century the English Church tardily and reluctantly adopted a yet larger freedom. The sacrament of marriage cannot safely be withheld from those who need it. The dislike of second marriages, once so strongly felt in the Church that even orthodox divines lent some countenance to the heretics who denied their lawfulness, has given way to this necessity. The ordinance of God is justified by experience, alike in the order of nature and in the order of grace.

CHAPTER III

Of Marriage in Human Law

BEING an institution of human society, marriage is inevitably an object of human law. There is probably no form of government, however savage, which has not fixed customs and regulations dealing with this matter, as there is no form of civilization, however relaxed and corrupt, which does not retain something of the kind. Men may depart very far from obedience to natural law, but they cannot escape from the necessity of recognizing the natural union of man and woman, or of guarding it by positive rules.

According to Hooker's distinction, these rules are either mixedly human or merely human laws.[1] They either enforce the natural law or direct men in ways which are naturally indifferent. This may be said of all laws which are in accordance with the will of God ; and since civil order is the natural state of man, the ministers of such order are the natural ministers of God, and the rules so made by legitimate authority are binding in only a less degree than the natural law itself. But since perversity and unwisdom abound, regulations made by fallible men are always liable to conflict with natural law. There are some who would deny to such perverse ordinances the august name of law, but the common use of speech forbids this nice discrimination. It must, therefore, be admitted that human law, not im-

[1] *Eccl. Pol.* i. x. 10.

properly so called, may disagree with natural law. In this case there is a conflict of authority and a grave disturbance of obligation. There can be no doubt that the authority of natural law is the greater ; but a man who knows what God the Creator has prescribed, and is at the same time commanded otherwise by the human laws to which he is ordinarily subject, may be in a great strait ; for a loyal submission to these laws in general is required by nature no less than obedience to the particular direction of the divine law that is in question. In all such cases of conflict it is necessary to walk warily. There is a presumption in favour of public law as against a man's private interpretation of the divine law, which may, however, be overthrown by a peremptory judgment of the man's own conscience ; he can then say only that he must obey God rather than man. When the divine law is interpreted by adequate authority, as by the teaching of the Christian Church, there is no such presumption in favour of public human law contravening it, but rather a presumption to the contrary part.

Reflection will show that human law may vary from the divine law of nature in five ways.

First, it may command or forbid, as above noted, things which natural law leaves indifferent. There is variation, since an act is forbidden which the law of nature passes by, or an act becomes obligatory which nature does not require ; but there is no contradiction, and no conflict of authority.

Secondly, human law may generally, or for a particular occasion, refuse to enforce a demand of natural justice ; as when a certain kind of contract is not legally recognized, or when by a *moratorium* the recovery of debts is suspended. In this case also there is no contradiction, since the law does not forbid the voluntary fulfilment of the natural obligation.

Thirdly, what natural law expressly allows, or even com-

mends, yet without obliging any man specifically to its performance, may be forbidden by human law; as may happen when particular kinds of religious observance are prohibited. In this case there is opposition, possibly of grave importance, between the two authorities; but the conscience of the individual subject is not strained, if the thing prohibited is not required of him in particular on any given occasion.

In the fourth place, human authority exercises a certain economic or dispensatory power in matters regulated by natural law. Dispensation is of two kinds. In the first kind, which is absolute, the operation of law is directly suspended in a given case; it can be granted only by the authority which imposed the law, since it is in effect a partial abrogation. Such dispensations are required by the imperfection of a law, not universally applicable to all cases alike, which the legislator himself recognizes, and thereupon remedies the defect of his own work. In this sense the maxim holds good, *Eiusdem est solvere cuius est ligare.* Such imperfection cannot be attributed to the natural law of God the Creator, which is therefore not open to dispensation of this kind. It is sometimes argued that God has by revelation allowed in men or societies imperfectly instructed things which are contrary to natural law, and some moral questions arising out of the records of the Old Testament are thus resolved; but it is safer to say with St. Paul that the divine compassion "overlooks" the times of ignorance,[1] and the attribute of mercy belongs to God rather as Judge than as Lawgiver. Alternatively, this economy of grace may be referred to the second kind of dispensation.

In this second kind, which is contingent, note is taken of the principle that all laws must yield to necessity. Fault is not imputed to a man who acts contrary to law under

[1] Acts xvii. 30.

positive constraint; and by the working of his own conscience he may in such case hold himself dispensed from the observance of the law. But the conscience needs a guide, and duress varies so widely, from actual bonds or imprisonment to the slightest effects of unnerving fear, that an external authority is sought to determine whether in a given case the obligation of law is relaxed. The divine law of nature is open to dispensation of this kind, not because the will of God is countered by any natural necessity, but because the will of man is obstructed both by the natural limits of his power, and by the unnatural perversity of himself or of his fellow men. To stretch himself beyond the natural limits of his power without the express gift of a supernatural faculty, is to defy God's law; to be restrained from intended obedience by the perversity of circumstances, by the failure of his own powers, or by the arbitrary interference of other men, is to stand in need of dispensation. Such dispensation is regulated *in foro conscientiae* by the *responsa prudentum*, the advice of those skilled in the science of souls, and by the authority for binding and loosing committed to the Christian priesthood; *in foro externo* it may be regulated by human law, which thus exercises an economic or dispensatory authority even in regard to the divine law. Homicide, for example, is contingently in certain circumstances justified by human law. Human law is not set against divine law, but, being itself authorized by the divine law of nature, it is employed within the purview of that superior law for this administrative function. If the function be rightly performed, there is here no conflict of authorities, but due subordination.

In the last place, human law may directly contradict the law of nature, forbidding what God commands, or commanding what God forbids. As an individual man can act against God's law, so can a community of men which has legislative

authority. Regulations so made may be unworthy of the name of Law, but neither use nor principle allows the refusal of that common denomination. As the unnatural act of a man is properly a human action, so the unnatural enactment of a human legislature is properly human law. The legislature does not lose its natural character by an act of rebellion against natural law. It retains its proper authority. There is now, therefore, a direct conflict of authorities, and the duty of the individual man is plain : he must obey God rather than man.

Applying what is here premised to the estate of marriage, we shall see that human law may either simply reinforce the law of nature, or may vary from it in one or more of these five ways. A third course is indeed theoretically possible. In Plato's imagined Republic marriage is ignored, if indeed the plan of promiscuous breeding under the control of the State does not involve its prohibition. The suggestion recently mooted, that the law should recognize only sexual connexions contracted for a limited period or during the pleasure of the parties, does without doubt involve the mere ignoring of marriage. A man and woman would not be prevented from contracting true marriage and fulfilling its obligations, but this would be outside the cognizance of the law ; the connexion recognized by law would not be marriage, though it might usurp the name. It would be legal concubinage, a contractual relation, the conditions of which would be regulated and enforced by law. Marriage in the natural sense, as we have seen, is not a contractual relation ; it begins with a contract, but a completed contract, the completion of which sets up a natural relation. When a man and a woman have consented to live together in wedlock, and have come together in accordance with that consent, their contract terminates in the natural state of marriage into which they have entered. Legal concu-

binage, on the other hand, is a relation set up by a continuing contract, which has no natural term, which is defined by law and can be rescinded by law. To recognize such a relation in lieu of marriage is to ignore marriage.

In practice, however, it may be doubted whether any political community has ever ignored marriage. It is certain that none of the communities known to history have done so. But neither does it appear that any community has ever been content to treat marriage purely as it exists in the order of nature, reinforcing without variation the requirements of natural law. Such treatment would indeed be impossible without that complete knowledge of natural conditions, and that complete submission to the Will of God, which are not to be found in any human society. The utmost that can be expected is that some regulations of human law will conform to natural law, while others will vary from it in the way either of addition or of conflict. The best form of human law will be that which escapes conflict, and avoids harmful or vexatious additions.

The enactment of laws regarding marriage is a part of the function of government belonging by nature to political societies, and therefore it is not necessary to enquire particularly where that power resides. It is enough for our present purpose that it exists and is exercised, whether for making general laws binding a whole nation, or for imposing narrower rules like those affecting princely houses in Germany. But since marriage is raised to the supernatural order as a sacrament of the Christian Church, it is important to ask whether the legislative and juridical powers of a civil community are lessened by that circumstance. Things purely of the supernatural order do not seem to be in any way subject to civil control, either in right or in fact, for the gifts of grace are intangible ; concrete things and human actions annexed to the supernatural order, as concerns

their natural constitution, remain subject to such control in fact, and to some extent in right; to what extent they ought to be withdrawn from under the hand of the civil power is one of the vexed questions of Christian politics. Those mysteries of grace in which common things are set apart for sacred uses afford the largest room for contention. To take the crudest instance, and one in which the common sense of mankind prevents actual clashing, the water of Baptism and the wine of the Eucharist are things evidently under the control of civic law, which might conceivably put serious hindrances in the way of their sacramental use. The sacrament of marriage is no less the exercise of natural human functions, which cannot be wholly withdrawn from the cognizance of the State. Indeed, since the first end of marriage is the continuance of the human species in a social order, there is nothing that touches more closely the duties and prerogatives of that organization, whatever it be, which is set up for the maintenance of social order in general. Even if marriage be not, through the development of patriarchal government, the very source of all civic constitutions, yet the Family and the State are naturally directed to the same end, and the one is but a larger growth in the same order. Those who would withdraw marriage, as a sacrament, from the control of civic law must therefore consider that in so doing they would dislocate the natural fabric of human society, which is not less founded in the providence of God than are the sacraments themselves.

Is the sacrament, then, subject to this form of human control? To solve the question, we must remember that marriage is raised to this dignity and sanctity by the addition of supernatural grace, but remains none the less in its natural constitution. A regulation of human law which leaves that natural constitution unimpaired will not affect the sacrament; where it is violated, there is no true natural

marriage, and consequently no sacrament. In neither case does the sacrament, as such, come under the control of the State. A tyrannical law may obstruct the administration of this, or of any other sacrament; an unwise law may confuse men's minds; but these perils no more justify a denial of the natural authority of the civil power in regard of marriage, than the corresponding danger of exclusion or adulteration would justify denial of the right of the State to regulate the production or importation of the wine which is the necessary matter of the Eucharist. The elevation of natural marriage to the supernatural dignity of a sacrament affects the responsibility of civil governments in only two ways; it calls for more reverent care in guarding the approach to matrimony, and it makes a breach of the marriage bond the greater wrong, as being touched with the reproach of sacrilege; the risk of careless administration, or of a sacrilegious system of legal divorce, is no reason for removing marriage from the cognizance of the State, as the risk of profanation is no ground for exempting sacred places from the protection of the police. It is always to be presumed that right will be done by the powers ordained of God, nor is the authority so given forfeited by abuse.

The State is not the only organization of human society. It is clear that mankind as a whole has a real social unity, continually recognized in ethical theory, though it has never secured an instrument of common government; it is a natural organism, though not politically ordered: it is not amorphous, because the species cannot exist without nucleated divisions comparable to the constituent cells of a living body. Forms of State, civic, national or imperial, are such divisions, and they cannot exclude the possibility of other divisions of a similar kind cutting across them and penetrating them. The unity of a family is not destroyed by the dispersion of its members under more than one

national government. Nature gives no special sanction to territorial delimitation, and a tribal or national ordering of society, with legislative and judicial functions complete, can perfectly well be independent of vicinage. The Jewish nation has illustrated this possibility for many centuries. Societies of this kind, whether natural as resting on birth and inheritance, or artificial and formed by the voluntary association of individuals, do in fact make rules for their members; when sufficiently established, they seem to be capable of giving to such rules the character of law. This power results from the natural tendency of men to social order, which does not point to one sole kind of community. Men can incorporate themselves. The theory of an unitary sovran State, which alone has corporate existence in its own right, and from which all other powers of incorporation are derived, is not taught by nature. It is a highly artificial product of political speculation, beginning with the Greek City, given a wider extension in the Roman Empire, revived with the study of the Civil Law in the Middle Ages, and pressed to a hard conclusion by the lawyers of modern Europe. Its speciousness comes from the fact that the State, as ordinarily understood, can refuse to recognize such independent jurisdictions, and that without this recognition it is difficult, under modern conditions, to enforce obedience. Yet obedience can be enforced in a measure where exclusion from the independent community is a matter of grave consideration to the individual. The recent history of the Christian Church, and of many organizations of social or economic value, is sufficient proof. It is mere pedantry to deny that the rules of such societies have the essential quality of law. Human law is the self-regulation of a society existing in accordance with natural law; it is recognizable in all cases where the society is able, by whatever kind of pressure, to put constraint on its individual members.

A society exercising this function, whether territorially organized or no, whether political or religious or economic, may be checked and even broken up by the superior force of another society; but so long as it remains in action it has the power of making laws. The technical objection to an *imperium in imperio* is mere jealousy on the part of an overbearing society.

We have, then, to face a further complication. As human law may be in conflict with natural law, so also diverse human laws may be in conflict with each other. For the individual man may be, and usually is, a member of more than one law-making society. If the various laws to which he is subject be antagonistic, he will be put to the question whether of them he should obey. There is here no indisputable solution as in the case of conflict between natural and human law; he will have to judge, by the light afforded to his conscience, where the greater weight of authority resides. In some cases judgment will be swift; one society may be obviously superior by the ordinance of God. In other cases there will be long hesitation, and the decision may seem doubtful even to the man who is obliged by circumstances to decide. From this difficulty the constitution of human nature seems to allow no entire release.

The Christian Church as a whole, and certain of its several parts, are law-making societies of this kind. It may be true, as contended by Sohm and others, that the Kingdom of Heaven was originally announced as a spiritual influence informing the consciences of individuals, and only by secondary action affecting human society; but this takes account of nothing but the preaching of the Gospel. But preaching was translated at once into action, having action for its immediate object; and this action could not be other than social. The sense of brotherhood under the common fatherhood of God, so characteristic of the Gospel, could be realized

only by association. The inevitable result, natural and therefore of divine appointment, was the instant emergence of a social order. "Probably never in the history of religion," says Harnack, "has a new society appeared with a more abundant and elaborate equipment." [1] There were two reasons for this: the first, already noted, that such development was natural; the second, making for swifter growth, that the Church issued from Judaism. The Jews were a nation, not tied down to any territory though having their head-quarters at Jerusalem, held together by a bond mainly religious but entirely effective, a nation with a government and jurisdiction which even the jealous authorities of imperial Rome were fain to recognize. Christians were a small minority among them, but they claimed to be the true Israel, the faithful remnant of a people that was in the main apostate, and so the inheritors alike of the promises of God and of the national life. The title *Ecclesia* means no less. According to the familiar order of this national life the Church was organized: it was the Diaspora.[2] The national law was taken over intact, and was after some contention adapted by the authority of the Church to the new requirements of the Gospel. The spreading of the Church beyond the limits of Jewry affected the position less than might have been expected. Those who were brought in of the Gentiles accepted the greater part of Jewish tradition as their own inheritance; the scriptures of the Old Testament became their literature, and the Hebrew patriarchs became their forefathers; Jerusalem, the Old or the New, was their holy city, and the law of Moses was the foundation of their jurisprudence. They were subject, it is true, to the various jurisdictions subsisting within the framework, as yet loose

[1] *The Constitution and Law of the Church in the First Two Centuries*, p. 20 (Engl. transl.).

[2] James i. 1; 1 Pet. i. 1.

knit, of the Roman Empire, or to tribal and national governments beyond the borders of the Empire ; they were taught to render a conscientious obedience to these, as ordained of God, and as far as possible the ordinary affairs of life were left to such discipline ; but there were limits to this obedience, and they needed a straiter discipline of their own. "Ecclesiastical law," says Harnack again, "arose in the main from the necessity of replacing those laws and regulations in force in the State, which Christianity was unable to recognize, by others dealing with similar conditions, and of improving those which Christianity was able to accept. . . . Paul already took a step in the former direction when he forbade the Christians to seek for justice at the hands of the tribunals of the world, and enjoined upon them to have recourse to qualified Christian brethren (1 Cor. vi.). But the whole organism of the constitution of the Church with its officials, right down to the development of the monarchical episcopate in every local community, is to be regarded as the formation of a legislative system, which arose simply because it was not found possible to recognize the existing organizations with their officials except very conditionally and within narrow limits." [1] One may think it more than probable that a like development would have taken place without the pressure of this particular need, but the actual mode of development is here accurately portrayed. From the first, the Church was a law-making society, exercising both legislative and judicial functions.

But what is the legislature of the Church, and where is the seat of judicature? The question is one for a general treatise on the Church, but it seems necessary here also to deal with it in summary fashion.

Setting aside, as contrary to the terms of the Apostolic commission, the contention of Marsiglio of Padua that for

[1] *Ibid.*, p. 144.

all societies alike, and so for the Church, legislative power resides in the *multitudo*, whence it is deputed to representatives, we find two possible answers to the question. The power of binding and loosing, which is both legislative and judicial, was vested by our Lord in the Apostles, and conveyed through them to others. It is conveyed either *in solidum* to the whole episcopate, according to St. Cyprian's definition, and exercised in undivided plenitude by each several bishop, or in a special measure to certain principal bishops, and to the Roman See in chief.[1]

Setting aside again, as contradicted by the evidence of history, the contention that our Lord conveyed to St. Peter, and through him to the Roman pontiff, a peculiar and universal power, we find the two answers resolved into one by the consideration that patriarchal and metropolitical powers emerge gradually by differentiation from the general powers of the episcopate. They were created by the practice of the Church, and are founded on the consent of the other bishops. But there seems to be no ground on which it can be argued that the bishops severally are able to make a final and irrevocable transfer of any part of their power, or to bind their successors by any submission to the authority of a superior See. They remain, therefore, always capable of resuming into their own hands the plenitude of

[1] Cyprian, *De Cath. Eccl. Unitate*, 5: "Quam unitatem tenere firmiter et uindicare debemus . . . ut episcopatum quoque ipsum unum adque indiuisum probemus. . . . Episcopatus unus est cuius a singulis in solidum pars tenetur." In the Council of Trent, Didacus de Payva argued: "Cyprianus, ut primas Africae, dispensavit cum virgine incontinente quia tunc potestas dispensandi nondum erat reservata papae, sed eam poterant etiam facere primates" (Theiner, ii. 261). Esmein says that in the seventeenth and eighteenth centuries French bishops still dispensed with impediments of consanguinity and affinity in the third and fourth degrees (*Le Mariage en Droit canonique*, ii. 331).

the power to bind and to loose. Thus St. Cyprian himself, though acknowledging without stint the superiority of the *Ecclesia principalis* at Rome, could repudiate the ruling of St. Stephen in the matter alike of the baptism of heretics and of the Spanish bishops Martial and Basilides.[1] The absolute independence of each several bishop is then checked only by the moral obligation to act in concert with the rest; and this obligation is enforced by the power residing in a synod of bishops to depose one who acts in a disorderly fashion. A bishop is thus constrained to act in co-ordination with others, and even in subordination to a synod or to a metropolitan, and a system of hierarchical law is thus produced, to which he ordinarily conforms. But he has the power to withdraw himself therefrom, subject to the risk of deposition. The chief restraint put upon him consists of the circumscription of his action within the limits of a diocese. He is thus in theory sole legislator and supreme judge in ordinary for his own local Church. In theory, I say, because in practice no bishop seems to claim power in this full extent, but is content rather in most matters to administer more general laws made by his colleagues in common, and to allow an appeal from his judgment to provincial and higher authorities. The legislative powers of a bishop are therefore usually in abeyance, but they subsist in reserve, and are the very fount of that law which he administers in apparent inferiority.

In regard to marriage, the Church began with a twofold task. In the first place, it had to guard and put abroad the

[1] Cyprian, *Epp.* 67, 72–5. Compare the action taken by French, English and other bishops, long after the complete establishment of the papacy, in " withdrawing obedience " from the rival Popes whom they severally recognized during the later years of the Great Schism. On this head Creighton may be consulted, *Hist. of the Papacy*, vol. i, chap. 2, *ad fin.*

teaching of the Master about the true nature of wedlock, the natural law. In the second place, it had to frame regulations for constraining its members to the observance of that law, and also to supplement the natural law, should that be found advisable, by further rules of conduct. In other words, the Church was at once the teacher of divine law and a maker of human law. Both occupations are illustrated by St. Paul's replies to the questions of the Corinthians. He distinguished between what he said by way of permission or dispensation, and what by way of commandment; between what he himself gave in charge, and what he said in the name of God; between the commandment of the Lord and his own judgment; between obligations of Christians and safeguards of marriage that were acknowledged equally by the heathen.[1]

We see here the beginnings of what grew into a vast system of jurisprudence, for marriage ultimately became one of the chief subjects of ecclesiastical law; power to legislate and adjudicate is thus early claimed and exercised. But the Church did not jealously affect this power. The inconvenience of having two marriage laws touching the same person is obvious; if the kingdoms of the world could be induced to bring their laws into conformity with the divine law, the Church might well be content. Even as things were, there was a wise reluctance to force a conflict. That objection might be taken, rightly or wrongly, to a decision involving such conflict, is shown by the complaint of Hippolytus against Callistus, who allowed women of noble birth to contract marriage, in defiance of the prohibition of Roman law, with men of lower rank or even with slaves.[2] When the Empire definitely became Christian, the efforts of the Church

[1] 1 Cor. vii. 6, 12, 25, 39; v. 1.

[2] Döllinger, *Hippolytus and Callistus*, pp. 147 seqq. (Engl. Transl.).

were directed to the reform of the Civil Law, and the Eastern Church ultimately went far in accommodating itself to the legislation of Justinian. The Western Church, on the other hand, continued to uphold its own rule, with the result that it finally ousted the law alike of the Empire and of the new Germanic Kingdoms, being exclusively invested by common consent with legislative and juridical functions in regard to marriage. The modern States of Europe and of the New World have reasserted their right to regulate marriage by law, and the rule of the Church has once more become what it was at the beginning, a law for the faithful which is possibly, and usually, in disagreement more or less with the laws of the State.

At the present day, then, we find these forms of human law in operation as regards marriage. In Eastern Christendom there is a system based on the sacred canons of the Church, but seriously modified by the Civil Law of the Roman Empire; elsewhere the various States of the world have their several marriage laws; concurrently the sections into which the Christian Church is administratively divided regulate marriage for the faithful by canonical rules and spiritual jurisdiction; the Jews throughout the world live by their own law, with more or less of subservience to the laws of the country in which they are domiciled; the Musulman law runs effectively in some regions where it is not accepted as national law; throughout India the law of marriage recognized by the supreme Government follows the religious profession of the parties; in some European colonies the tribal laws of the aboriginal inhabitants run concurrently with those of the colonists, being severally applicable with a strict distinction of persons; in certain Asiatic countries the laws of European States apply by virtue of capitulations to their nationals resident therein; when note is taken of the particular marriage laws of the princely houses of Germany, and of the

doubtful efficacy of Mormon law in North America, I know not if a complete survey has been made in brief of the present state of human law regarding marriage.

These diverse laws vary more or less from natural law in the five ways above specified.

Little need be said about the fifth mode of divergence. A human law directly opposed to the divine law, requiring men to do what the divine law forbids, or forbidding them to do what the divine law commands, will not often be enacted in respect of marriage, and presents no difficulties to the conscience of a Christian. He must obey God at all costs. Under this category would come a law which should not merely recognize in place of marriage a terminable contract of union, but also forbid any contract of true marriage ; a law purporting to restrain the Church from teaching or enforcing on its members any part of the divine law ; and any attempt to compel the recognition of a forbidden marriage.

The other four modes of divergence call for careful consideration. For here human law may differ from the divine law of nature, juridically or by legislation, in ways which are tolerable, but always perilous and requiring the closest watchfulness.

And first, juridically. The natural law has no judicature, save in the tribunal of conscience erected within each man's soul. There is, indeed, a form of judgment, known only by execution of sentence, in which God Himself, the supreme Judge, visits offenders against His laws with the consequences of their misdeeds ; but of this working of the divine providence little is understood, and that imperfectly. There is also an expectation of judgment, in which every man shall receive the due reward of his deeds, known to the Searcher of hearts. But that does not belong to the present order of human life. In this order the regular administration of justice, whether for the punishment of crime or for determin-

ing the right between man and man, is committed to human society and controlled by human law.

A tribunal appointed for this end has for its first duty the enforcement of natural law, for its second the interpretation and application of the particular laws of the society in which it is founded. But the natural law also requires interpretation as it is applied to particular cases, and here any tribunal may err ; therefore a judge, even while he professes to be following the law of nature, may depart from it. Further, he is bound by the particular laws of his own society, whether a fundamental law such as the Constitution of the United States of America, established custom, or the last word of the legislature, and he cannot set natural law to override these ; he may read them narrowly, and studiously pare them down to the closest possible conformity with natural law, but he must finally accept the obligation which they impose. This does not mean that human law is held to be superior to natural law ; it means only that a judge who is set to administer a particular system of human law must assume this system to be in agreement with natural law. He must therefore judicially hold anything conflicting with the system to be no part of the law of nature. The alternative is to abdicate his tribunal. It was partly for this cause that Christians of the first three centuries were forbidden to hold judicial office in the Roman Empire.

A judge, then, who has before him a cause in which a question of marriage arises, must necessarily follow the particular human law which he administers, where it prescribes anything ; and at the present time such laws are usually so complete in detail that variations from natural law are attributable rather to the legislative than to the judicial authority. In some countries, however, and notably in Scotland, there has been so little legislation about marriage that questions not infrequently occur which can be resolved

only by consideration of natural law. In such cases, as also in a less degree where positive law is to be applied, a tribunal may be hindered in two ways from making an accurate determination.

In the first place, evidence is required. Courts have their several rules of evidence, which they usually follow, or by which they are bound. These are sometimes highly artificial, and a case may be turned by the arbitrary exclusion of important testimony. When it is necessary to determine the question whether, in fact, a contract of marriage has been made, the court can only decide the case on the evidence admitted. In Scotland, where the judges are usually inclined to a favourable construction, scanty evidence of the fact will be held sufficient, especially if the parties are known to have lived together as man and wife. In England, where the contract is guarded by stricter formalities, much more rigorous proof is demanded. If in the one case an union may sometimes be recognized by law which is no true marriage in the natural order, there is obviously still greater risk in the other case of the denial of a true marriage, by which the natural law will be set at naught.

In the second place, a rule of law respecting the right of application to a court may hinder the ascertaining of facts. A tribunal may look at the question of the validity of a marriage from two different points of view. It may set itself merely to arrive at the facts, or it may regard the case as arising out of the motion of a petitioner who seeks a decision for a purpose of his own; he may, for example, desire to be released from the obligations of a marriage which he has ostensibly contracted. A court which takes the latter point of view may reasonably impose certain conditions on the petitioner. It may rule that he shall not be allowed to take advantage of any fault or neglect of his own. Such is the practice of the High Court of Justice in England, illus-

trated by a notorious case decided some years ago, in which the petitioner asked for a decree of nullity on the ground that the other party had consented to marriage unwillingly under constraint; the constraint was proved, but the petitioner was shown himself to have taken part in applying it, and his petition was therefore dismissed. In this case there was evidently no true marriage, but a legal declaration of the fact was disallowed, and the parties were therefore debarred by law from contracting fresh unions. The opposite point of view is illustrated by a case recently decided in the tribunal of the Rota at Rome. A man made at the time of his marriage a false declaration, which had the effect, according to the law there administered, of vitiating the marriage contract; he himself afterwards applied for a decree of nullity on this ground; the practice of the court required the judges to investigate the fact, and to decide accordingly; the facts were found to be as stated, and the court had no option but to declare the marriage void.[1] This practice certainly guards the realities of marriage more jealously than the English rule, but it has the serious drawback of lending a handle to one who would entrap another into an invalid marriage.

The above examples show how juridical difficulties may cause divergence from the divine law of nature. More important, and more extensive, are the divergences brought about by legislation.

First, by way of addition. Human law prescribes something over and above what natural law requires. Ecclesiastical law, for example, requires that marriage shall be contracted publicly, *in facie ecclesiae;* the common law of Ireland requires it to be done in the presence of a minister of religion; the law of Scotland requires the presence of

[1] See *Roman Documents and Decrees*, January, 1912, pp. 80–3.

witnesses, and the previous publication of banns; the law of France requires the parties to attend at the *mairie* of the place where one of them resides, and there to make their verbal contract before a public official. In England, the use of the ritual of the Church was once required by law in all but some few specially excepted marriages. The public registration of a marriage is obligatory in most countries. These various provisions of law may be enforced under severe penalties; they may conflict sharply with each other where there are simultaneous authorities claiming obedience from the same persons, as the French law of civil marriage conflicts with the ecclesiastical law, but they do not so far run counter to natural law, since they merely require actions which are naturally indifferent. Of the same kind are regulations concerning dowry, the specific rendering of mutual support and service, the liability of husband or wife for debts severally incurred, the legitimacy of children, and succession to goods or honours. Some of these matters are ordered in principle by the natural law, but considerable scope is left for supplementary legislation.

Secondly, as it has been said, human law may refuse to enforce what nature requires. It may refuse to treat adultery, polygamy, or any other breach of the marriage bond, as a crime. In England, the old procedure for compelling husband and wife to live together, at the instance of either party, has been made inoperative, and a wife has been almost entirely freed from legal liability for the support of her husband. These deflections from the natural order tend to obscure the character of the relation set up by marriage, especially for the many who have not learnt to distinguish between moral and legal obligations; but they do not actually hinder the observance of the divine law by individual persons, or otherwise raise any embarrassing conflict of authority.

In the third place, human law may interpose impediments in the way of a marriage naturally permissible. It must be remembered that even nature imposes some restrictions; not every man is free to marry every woman. It is not easy, as we have seen, to determine precisely what are these natural bars; the difficulty is increased by the general creation of artificial obstacles, since it is hard to draw the line between those which are truly natural and those originating in the common opinion of mankind. The test of universality is good on the affirmative side, for if the common sense of the whole race condemn a certain marriage, this agreement can hardly be put down to anything but a natural instinct; but it is of little value on the negative side, since there may be a small part only of the human race sufficiently acquainted with certain truths of nature to recognize them as law. What is abundantly clear is the addition by human authority of many impediments to those founded in nature. The laws of savage tribes are rich in such prohibitions, which lapse with the advance of civilization towards the true natural conditions of human life. Strict rules of exogamy or of endogamy, complications of totemism, inexplicable barriers of tabu, attest the activity of remote legislation setting up hindrances to marriage, which retain their force long after their primary purpose or meaning is forgotten. Lingering effects are found in civilized life, and few systems of law which have been developed in freedom are without such traces of savagery.

Possibly in historic connexion with these obscure impediments, but based on more intelligible reasoning, are deliberate prohibitions of intermarriage between persons of different nations, of different castes, of different religion, of different social standing. The strict segregation of the Jews dates from the reforms of Ezra, though it was based on older laws. The *Ius connubii* was confined first to Roman

patricians, then to all citizens of the republic in common; it was extended charily as a favour to cities coming into close alliance. St. Paul seems to have laid down the rule for Christians that they must marry only "in the Lord," [1] that is to say, with believers.

Restrictions of time, again, are imposed on lawful marriages. By the rule of the Church marriage has been forbidden within certain sacred seasons; [2] by the law of England it is forbidden except between certain hours of the day; under the Swiss federal code a man may not marry before he is twenty years of age, a woman before she is eighteen. In Belgium, a widow may not marry within ten months of her husband's death.

Marriage may be forbidden without special consents, unknown to the law of nature. A slave may be held altogether incapable of marriage, because he is a mere chattel of another man and therefore unable to enter freely into a contract; but he is more usually allowed to marry with the consent of his master. The Roman law, with its exaggeration of *patria potestas*, extended the requirement of paternal consent far beyond the limits indicated by nature. French law forbids a man to marry without his father's consent, except under conditions which do not become operative until he has reached the age of twenty-five years. In England there is required for the marriage of a member of the royal family, subject to not unlike conditions, the consent of the reigning sovran.

Personal disqualifications, again, may be imposed. A vow of religion is by ecclesiastical law an impediment to

[1] 1 Cor. vii. 39.

[2] Such was the older discipline, though in modern times only the *publica pompa* is forbidden. See Benedict XIV, *Inst. Eccl.*, tom. ii., p. 443.

marriage, and in the greater part of the Christian Church men in holy orders also are forbidden to contract matrimony. Artificial impediments of consanguinity and affinity have been added to those prescribed by nature. In several systems of law persons guilty of certain crimes have been forbidden to intermarry, as when a man and woman have conspired to murder the husband or wife of one of them with a view to marriage.

The creation of such impediments in restraint of natural liberty seems to be within the power of any legislature. They may in some cases be injurious or contrary to public policy, as unduly interfering with an instinct of nature, but they do not involve any direct violation of a natural law. Neither, it will be observed, can they run counter to one another. A man who bows to the two several authorities of Church and State, or who is by the accidents of birth and residence made subject in some measure to the laws of two several States, can avoid a marriage forbidden either by the one or by the other. The prohibitions are concurrent and cumulative ; they cannot be contradictory. It therefore seems to be the duty of a Christian to render obedience to all such prescriptions of law.

A grave question, however, emerges when the legislature proceeds to enact that a marriage contracted in defiance of its prohibition is null and void. In no system of law, perhaps, are all prohibitions supposed to have this effect ; some only, of the graver kind, are selected as nullifying the contract. Hence the distinction drawn between impediments which are merely obstructive, and diriment impediments which are destructive. Identical in effect is a law providing that a marriage shall be deemed void if it be contracted without those additional formalities mentioned above. That is, in fact, to make the lack of due formality a diriment impediment. This was done by the Council of

Trent in the case of clandestinity; a marriage contracted otherwise than *in facie ecclesiae* had previously been treated as illicit, but valid; the Council decreed that it should in the future be invalid, and further defined the conditions of contracting *in facie ecclesiae* by requiring the presence of the parish priest and of two other witnesses. Clandestinity, so defined, thus became a diriment impediment wherever the decree was promulgated as law. In England, a still more stringent condition was imposed by the Marriage Act of 1753, which annulled almost all marriages contracted otherwise than with the ritual solemnities of the Church; the Royal Marriages Act also annuls marriages contracted in disregard of its provisions. The law of France since 1792 in the same way not only requires a marriage to be witnessed and registered by a civil functionary, but also annuls any contract lacking this formality.

To the creation of diriment impediments by human law two exceptions have been taken. It is urged on the one hand that marriage is a fact of nature, which no positive law can annihilate; if a man and a woman do, in fact, unite themselves in defiance of such law, they may rightly be punished, but their marriage stands in fact unassailable. It is contended more technically, on the other hand, that since marriage is a sacrament, and since the essential matter and form of a sacrament are supposed to be ordained by God, therefore the validity of a true contract of marriage, in which the matter and form of this sacrament consist, cannot be destroyed by any human authority.

In defending the Council of Trent against the second objection, Benedict XIV answers both. The matter and form of the sacrament consist, he says, in the actions and words of the parties by which they *mutuo ac legitime* deliver themselves each to the other; the Council decided that in future this should not be done *legitime* except under the prescribed

conditions.[1] But the sacrament of marriage, as we have seen, is nothing else but natural marriage contracted between baptized persons; there is required for it nothing but the qualities that make a valid contract in the order of nature, together with the qualification of baptism in the parties. Therefore, if this reasoning is to hold good, there must be added to the other qualities required by nature in a valid contract of marriage the further qualification of *legitimacy*; that is to say, of accordance with the conditions from time to time imposed by human law. This is no mere afterthought of theology. As early as the twelfth century, Hugh of St. Victor so taught with emphasis.[2] If the need of legitimacy can be thrown back to the natural law, the difficulty will disappear. And this seems reasonable. For human society and human law exist in the order of nature by the ordinance of God, and marriage is primarily an integral part of that social constitution. It is, therefore, reasonable to contend that by the divine law of nature not only the outward trappings of matrimony, but also the essential conditions of the contract, are subject to the control of human law. If this be allowed, both objections to the creation of a diriment impediment simultaneously disappear. It will be seen, however, that the reply as above conceived is too wide. If a contract of marriage, to be valid, must be legitimate, it will follow that neglect of any legal requirement will be fatal, and all impediments will be diriment. So much is claimed in no system of law, and it is obvious that an authority capable of creating a diriment impediment can also

[1] *Instit. Eccles.* tom. i., p. 371. He elsewhere argued that the decree did not touch the essence of the sacrament, but only rendered the parties, in the given circumstances, "inhabiles ad contrahendum." This has become the commonplace of theologians.

[2] *De Sacram. Christ. Fidei*, ii. 11, 4. "Si consensus masculi et feminae legitimus, hoc est legitime et inter personas legitimas factus, non fuerit, coniugium in eo consecrari non potest."

fence marriage about with safeguards, neglect of which are expressly determined to have a smaller effect. What is required is that a contract of marriage shall be legitimate only so far as concerns the set conditions of validity.

But a further objection has now to be considered. It is said that human authority can indeed create diriment impediments, but that where Christians are concerned this must be the authority only of the Church. The ground taken is that marriage is a sacrament, the administration of which belongs exclusively to the Church, or merely that it is *sacrum*, and therefore under the control of the Church, "quae rerum sacrarum sola habet magisterium." [1] The latter argument implies the control of all marriages by the Church, the former looks only to the sacramental marriages of Christians. The larger claim would probably not be pressed. The Congregation *de Propaganda Fide* has repeatedly held converts from heathendom bound, in respect of marriages contracted before their conversion, by diriment impediments arising out of their own laws.[2] The narrower claim needs examination. Against it is the judgment of St. Thomas Aquinas, who says expressly that a person may by civil law be rendered *ad matrimonium contrahendum illegitima*. The context shows that he is speaking of diriment impediments, since the matter in question is consanguinity.[3] Indeed, the

[1] Leo XIII, Encycl. *Arcanum*, quoted by De Smet, *De Sponsalibus et Matrimonio*, p. 261, who labours to reduce this *obiter dictum* to a demand that the State shall in such matters bow to the *altius ius ecclesiae* where it exists in act.

[2] Gasparri, *Tract. Can. de Matrimonio*, vol. i. pp. 172–5. He dismisses the contrary opinion as abstract scholasticism.

[3] *Sum. Theol. Suppl.* 50, 1. The objection stated is "Plures gradus consanguinitatis inveniuntur esse prohibiti uno tempore quam alio: lex autem humana non potest, ut videtur, matrimonio impedimenta praestare, quia matrimonium non est ex institutione humana, sed divina, sicut et alia sacramenta." The answer is: "Matrimonium, inquantum est in officium naturae, statuitur lege

difficulty is easily solved by an application of the argument that we have just drawn from Benedict XIV. For it is a legitimate contract which is constituted a sacrament ; there cannot, indeed, be a separation in time between the natural contract and the sacrament, as though the contract were first made and then became a sacrament, for it is indivisibly one act ; but the contract is logically prior to the sacrament, and therefore conditions of legitimacy may be imposed without reference to its sacramental character. Thus the creation of a diriment impediment by the State is not an interference in the spiritual ministration of the sacrament. It presents an external obstacle to this ministration, but only as the exercise of legitimate force may in particular cases prevent a priest from ministering the sacrament of baptism or of the Eucharist. It prevents the actual ministration of a sacrament ; it does not pretend to invalidate a sacrament duly ministered. The relations of Church and State are often delicate and difficult of adjustment, but unless the ministers and fabrics of the Church are to be entirely exempt from civil jurisdiction, this sort of interference must be recognized as possible and legitimate ; it requires only a just occasion to be reasonable. The claim of complete exemption was put forward in the twelfth century, but now seems to be universally abandoned. To make it good in respect of marriage, it would be necessary to claim exemption not only for those in the sacred ministry, but also for all persons and things in their relation to the sacraments ; it must be unlawful to arrest a man on his way to church, or to put an import duty on wine that is to be used for the Eucharist. In no other

naturae ; inquantum est sacramentum, statuitur iure divino ; inquantum est in officium communitatis, statuitur lege civili : et ideo ex qualibet dictarum legum potest aliqua persona effici ad matrimonium contrahendum illegitima." Although the phrase is ' ad matrimonium *contrahendum*," the reference to consanguinity shows that the answer extends to diriment impediments.

way could the civil power be restrained from all interference with the sacraments. But such restraint is palpably absurd. Therefore the State cannot on this ground be denied the right of controlling marriage by law. But to control marriage by law is to determine the legitimacy of the contract, and to determine that a given contract is in the highest degree illegitimate is to create a diriment impediment. This, then, is within the province of the State.

It is evident that a legislature may set up many or few such impediments. The number is a matter of public policy. The present law of Scotland appears to know no diriment impediments except such as are supposed, rightly or wrongly, to rest on the divine law; consequently, marriage is placed as nearly as possible on its natural basis, and there is great stability of the bond. On the other hand, the Canon Law of the Middle Ages abounded in diriment impediments, so that nullifications of marriage were frequent and grave moral disorder ensued. It cannot be doubted that multiplied impediments are evil; the moral effect of making clandestinity a diriment impediment is matter of serious debate.

To conclude, it appears that any genuine legislature can create impediments, obstructive or diriment, which will bind the consciences of all persons properly subject to the same. A person subject to two authorities, as a Christian is subject alike to the Church and to the State under which he lives, must observe the regulations of both. Neither authority can abrogate the impediments created by the other, as neither can abrogate impediments which are natural. The various laws do not clash; they are concurrent.

In the next place we have to consider the power of dispensation, absolute or contingent, inhering in human law. An absolute dispensation, as we have seen, is a definite suspension or relaxation of law in a particular case; it has

the effect of entirely removing the obligation to observe the law; it is therefore a kind of abrogation, and can be granted only by the authority which has made the law. The legislature can dispense, or can commit specific powers of dispensation to officials.

The obligation of the divine law of nature cannot be thus set aside except by God Himself, nor is there any ground for supposing that God either grants dispensation directly or commissions any minister so to act. We may rather reckon this impossible, since such relaxation is called for only on the ground of some defect in the law making it inapplicable to a given case, which is not to be thought of in connexion with God's law. Here, therefore, is no room for any variation from the divine law; but the exercise of the dispensing power must be considered as a whole, the lines of division being not very clearly marked, and absolute dispensation must be as far as possible defined before we review that contingent kind which is alone applicable to the law of nature.

In every system of human law dispensation is possible, whether it be allowed in fact or no. Things commanded in relation to marriage or the contract of marriage may be relaxed, things forbidden may be allowed, impediments obstructive or diriment may be removed. Removal of a diriment impediment makes a marriage valid which would otherwise be void; other dispensations liberate the persons to whom they are granted either from the obligation to act in a certain way or from the consequences of a breach of the law. These obligations and consequences are either moral or legal, and dispensations are therefore said to be granted either *in foro conscientiae* or *in foro externo*. A dispensation may be granted either before the act to which it refers is undertaken, with a view to its lawful performance, or after it is done, with a view to its condonation. When

a diriment impediment is removed after a putative marriage has been contracted, two courses are possible : either the consent of the parties is renewed, and the marriage is then valid from the date of such renewal, or by a special act of grace the marriage is reckoned valid from the beginning. Such validation, technically called *sanatio in radice*, is effected in English law by a special Act of Parliament, in favour of parties who have inadvertently and in good faith contracted marriage without fulfilling some of the requisite conditions.

Absolute dispensation must be provided for within the system of law to which it applies. The legislature of one community, or its officials, cannot dispense with requirements imposed by the laws of another community. But this rule, so obvious and inevitable, is subject to one considerable qualification. By the comity of nations the laws of one country are in a measure recognized and enforced by the courts of another country, and the domicile of the parties may therefore be a matter of considerable importance in matrimonial causes. Though there is no perfectly consistent practice in this regard, an English Court will consider the validity of a marriage contracted abroad in the light of the *lex loci*. A marriage may thus be held valid which would be invalid according to the strict interpretation of English law, or conversely. But there is no doubt that a marriage so adjudged invalid might be validated for the purposes of English law by a special Act of Parliament. For the purposes of English law, I say, because this dispensatory act might have no effect in the other country concerned. What makes the dispensation possible in England is the fact that the law under which the marriage was declared void is for this purpose adopted, by international comity, into the body of English law ; as so adopted, but not otherwise, it can be set aside by the English legislature.

A nice question of conscience will ensue, whether the parties can hold themselves morally free to continue in the marital relation; it will be for them to determine, with such guidance as may be obtainable, which of the two conflicting authorities has the greater claim upon their obedience. The answer may partly depend upon their existing domicile.

From this there follows an important corollary. The Church also is a community having the power to create impediments binding its own subjects, and to relax them by dispensation. The Church also should respect the laws of other communities creating impediments which bind their own subjects. The subjects of the Church are in all cases subject also to a civil community, and therefore they owe obedience to two several authorities. They ought not to disregard impediments created either by the one authority or by the other. Normally each authority should respect the impediment created by the other; the State should not recognize marriages contracted by subjects of the Church in defiance of the rules of the Church, and the Church should not allow marriages contracted by subjects of the State in defiance of the rules of the State. Jealousy of sovran rights on the one side or the other, and sometimes on both, usually prevents this reciprocity; but the Church, as the teacher of a higher regard for right, may be expected to act in this way even where reciprocal action is refused. It seems clear that the Church ought not ordinarily to allow marriages contracted in disregard of civil law. Only in case the law should positively demand something contrary to the order of nature, or something which would render impossible obedience to the rules of the Church, is there ground for open antagonism. But when this respect for law is fully established, it will still be possible, as for the State, so also for the Church on behalf of its own subjects and for its own purposes, to dispense with the observance

of a law not its own. Given the most complete reciprocity, the State might for its own purposes, as for example in regard to the legitimation of issue, validate a particular marriage declared void by the Church; and equally the Church might for its own purposes validate a marriage nullified by the State. The purposes of the Church are purely moral and spiritual, and thus the parties to a marriage so validated would be free in conscience to live together as man and wife, and would not be free in conscience to break their union or to form another. For example, a marriage contracted by a member of the English royal house contrary to the provisions of the Royal Marriages Act, and so nullified by the laws of England, might by dispensation of the Church be validated for ecclesiastical purposes, and would then be a marriage good for the conscience of the parties. Such an union may be called a *marriage of conscience*, though the phrase is more commonly used in another connexion.[1]

This kind of cross-dispensation must not be confused with the practice established in England, by which officials of the Church dispense with legal impediments created or recognized by the laws of the State. That anomalous jurisdiction is due to the suppression of the distinction of Church and State during the Middle Ages, an abiding consequence of which is that rules of the Church have been incorporated into the laws of the realm. Of this there is more to be said later; it is enough to say here that dispensations granted by bishops and their officials have both civil and ecclesiastical effect. This combination of functions appeared when Church and State fell apart and the State began to have its separate marriage law. By the present law of England, all marriages contracted without legal formalities are ordinarily treated as null and void; clandestinity, which was for-

[1] Below p. 99.

merly an obstructive impediment in the law common to Church and State, is thus made a diriment impediment in the laws of the realm.[1] The customary bishop's licence, however, dispensing with publication of banns, or a faculty from the Archbishop of Canterbury more largely dispensing with other forms, commonly known as a "special licence," is effective for the removal of the impediment. These dispensations consequently have a double effect, removing both the old ecclesiastical impediment and the new civil impediment; in the archbishop or bishop must be recognized two functions, for he is at once an officer of the Church in his hierarchical capacity, and an officer of State constituted by statute.

The power of absolute dispensation must be recognized as one that is lawfully exercised, but also as one that should be used with extreme caution. Dispensation is *vulnus in legem*, and frequent disturbances of the kind weaken the law to the verge of destruction. The marriage law of medieval Europe was in this way brought into contempt, and lost almost all power of ordering social life. But contempt of human law carries with it as a consequence contempt of the divine law, since in the general opinion of men the two are seldom clearly distinguished, and that which has the more visible and material sanctions either buttresses the spiritual authority of the other, or drags it down in its own ruin. Thus the practice of absolute dispensation, though not directly contravening the divine law, may seriously hinder its effective working. But excess of dispensation is obviously brought about by excessive regulation; when requirements, prohibitions and impediments are multiplied, individual relaxations are inevitably numerous, for strict observance becomes a burden that cannot be endured.

[1] *Infra*, pp. 206–8.

That was the fault of the medieval marriage law. The happiest law is that which adds least to the law of nature, and can therefore insist most strictly on the observance of the whole.

A contingent dispensation is grounded not on the inapplicability of the law regarded in itself, but on the necessity of the individual subject. It follows the maxim, *Nemo tenetur ad impossibile.* There is no assumption that the law is in a particular case bad law, and therefore to be set aside, or mischievous in operation and therefore to be suspended; enforcement of the law might be in all respects salutary, but the fact is recognized that the subject cannot comply. Thus the most perfect and the most universal law is open to dispensation of this kind.

Who can dispense in this case? The authority of the legislator is not here required, for there is no question of abrogating or relaxing the law. Indeed the dispensation is in a sense automatic, for it follows from the mere fact of the impossibility of compliance. A man who in his own conscience knows himself to be unable to obey is *ipso facto* dispensed in conscience from the obligation to obey. But for two reasons this clearing of the conscience will be insufficient. In the first place, no man has a merely individual life; obedience to law is a matter of social observance, and the impossibility of obedience needs some kind of social recognition if it is to be a complete discharge. In the second place, even as regards the individual aspect of the case, the inevitable bias of self-interest forbids a man to be judge in his own cause, and in all grave matters the *prima facie* judgment of conscience should be referred to an independent tribunal.

We speak of a tribunal, and it has been held that contingent dispensation is essentially a juridical act. "It is improperly called dispensation," says a well-known author,

" because it is only a judicial, whereas dispensation proper is a legislative, act, being of the nature of a temporary repeal of law." [1] It is held, indeed, by Esmein that prior to the eleventh century all dispensations in ecclesiastical law were of this character, consisting merely in a remission of the disciplinary penance usually imposed on breakers of the law.[2] But whatever may be the history of the practice, whether in the Church or in any other society, this is not an adequate account of the dispensing power. A dispensation differs from an act of grace by which punishment is remitted or sentence is withheld in favour of the guilty; it is a declaration that no guilt is incurred, that the act in question is, in view of the circumstances, innocent and lawful. The judicial act to which it corresponds is complete acquittal. But neither is this an adequate comparison; for acquittal follows the imputation of an offence done, while a dispensation is more frequently a declaration, made beforehand, that a thing may lawfully be done. Therefore, when a tribunal is spoken of in this connexion, the word must not be taken in any strict sense. It is enough that the declaration be made by some competent authority, to which the person dispensed owes allegiance.

The dispensing authority need not stand in any particular relation to the law which is involved. For the only matter to be determined is the question whether the subject has a valid excuse for not observing the law. For the due ordering of this matter the only thing requisite is a proper relation between the authority and the person dis-

[1] E. G. Wood, *The Regal Power of the Church*, p. 75.

[2] Esmein, *Le Mariage en Droit Canonique*, vol. ii. pp. 319–22. The change took place, he says, when the sacred canons ceased to be merely disciplinary and became laws, since " les lois sont de leur nature impératives, et s'imposent au juge." Consequently dispensation became " l'exercice du pouvoir législatif."

pensed. No system of law, therefore, need make provision for contingent dispensation, and such dispensation from any law, even the divine law of nature, can be granted wherever a legitimate human authority is constituted. It is possible, indeed, to argue that all human authority is ultimately founded in the law of nature, which thus confers the power in question; but that refinement is unnecessary. Every law contains implicitly provision for the case of necessity, but it need not prescribe how the measure of necessity shall be judged. It is enough that man lives inevitably in a social order and under a social authority, which has an inherent right to direct and control his actions.

It is obvious that contingent dispensation is important chiefly as applied to divine law. Human law admits of absolute dispensation; divine law does not. It ceases to bind only in the case of necessity. Necessity is not to be interpreted too rigidly. It is not only sheer compulsion or physical impossibility that is to be reckoned with; account must also be had of human frailty. The necessity which justifies dispensation is a moral necessity. The hardness of men's hearts was a ground for the permission of divorce under the Mosaic law; the permission was grossly abused, but was not on that account entirely done away.

A moral necessity, then, is sufficient ground for contingent dispensation. The necessity must be real. The value of the dispensation depends on this reality. An erroneous judgment may discharge a delinquent from the imputation of guilt before the tribunal by which judgment is given, but it does not discharge him from all obligation if his own conscience be better informed. The dispensation remains always contingent. Subject to this contingency a human authority can dispense its own subjects from the observance of the divine law; it being clearly understood, as

Benedict XIV has said, that there is no loosening of the binding character of that law, but only an interpretative ruling that in the circumstances of the case a particular person does not come under the law.[1] This being the largest claim made for the dispensing power, we may confine our attention to it, remembering that what is allowable in regard to divine law may with better reason be done also where human law is concerned.

Of contingent, as of absolute dispensations in the matter of marriage, there are two purposes. They are intended either to remove impediments, and so to validate and regularize a marriage, or to abate the obligations laid upon those who are married. It will be convenient to consider the latter purpose first.

The natural law requires husband and wife to abide in permanent union, with complete community of life. From this ideal there are two possible derogations. They may separate entirely, or may remain united in a state of imperfect community. We have to ask whether such departures from the divine rule are contingently permissible.

Complete separation, *a mensa et toro* as the phrase runs, is properly called divorce. This word is frequently abused to mean a judicial decree either declaring the nullity of a marriage or purporting to dissolve the bond of a valid marriage, and its proper sense is sometimes even excluded. That such separation will sometimes be necessary is incontestable, for it may result from natural causes beyond the control of the parties, but there are moral necessities also which may justify it. For either party, however, to refuse cohabitation is to claim that right of judging in one's own cause which is intolerable in social life, and the intervention of lawful authority is therefore required. Divorce

[1] *De Synodo Dioecesana*, vii. 1, 7.

must be regulated by law. There is, perhaps, no system of law which makes no provision for it; in many systems it is allowed with injurious frequency and ease. It was in face of a question about a lax interpretation of the Mosaic law that our Lord took opportunity to assert anew the permanence of marriage and the closeness of the union effected; but He recognized the dispensing authority of the law. "Moses," He said, "for your hardness of heart suffered you to put away your wives, but from the beginning it was not so." [1] Divorce was contrary to the natural institution, but allowed for a just cause. The hardness of heart which justified it has been variously interpreted to mean that a man would treat his wife with intolerable harshness if compelled to live with her against his will, or that human obstinacy and selfishness rendered the strict observance of the natural law impossible. He further taught the indissolubility of the bond by asserting that even after divorce the parties were still capable of adultery, but this was an enlargement of the answer demanded. The immediate question was the lawfulness of divorce. Was none to be allowed? The Mosaic dispensation seemed to be reprobated, and the disciples discontentedly observed that this made marriage altogether inexpedient. To them in private our Lord intimated that exceptions were possible: "All men cannot receive this saying, but they to whom it is given . . . He that is able to receive it, let him receive it." There were some to whom the rigour of the law would not apply, and, as we have seen above,[2] one of the evangelists has inserted a reference to the exceptional case of fornication.

The Christian Church has reluctantly used the liberty thus accorded, pronouncing divorce in the case of an unfaithful wife. The unfaithful husband, though the sin of

[1] St. Matthew xix. 11. [2] *Supra*, p. 24.

adultery is no less in him that in the woman, does not do his wife the wrong of imposing on her a spurious offspring, and his offence has not as a rule been considered sufficient ground for divorce unless it be accompanied by aggravating circumstances. But these circumstances have thus been recognized as further grounds for divorce, and have in their turn been accepted as sufficient in themselves. The practice in different parts of the Church is not uniform, but it may be said generally that any conduct of husband or wife making cohabitation intolerable, and frustrating the true ends of marriage, is considered sufficient ground for the exercise of the dispensing power, in the form of a judgment of divorce. Theologians commonly reduce these causes to the three heads of adultery, apostasy, and grave peril to soul or body.

The greater laxity of the civil laws of some modern states, allowing divorce for light causes of disagreement, or even by mutual consent, do serious wrong to the natural law; the power of dispensation inherent in human society is not to be denied even here, but it is a grave question whether a Christian can hold himself free to take a liberty thus accorded. Yet separation by mutual consent is allowed by the Church in certain cases. St. Paul's rule, that the married may withdraw from one another for a time to give themselves to prayer, has been extended to cover the life-long separation of a husband and wife devoting themselves to religion.

Short of divorce the strictness of the unity of marriage may be relaxed by a modification of the common life required by natural law. It may be reduced in the two particulars of property and of social standing.

An abatement of community of goods is effected by the custom of dowry, by the English use of marriage settlements under the law of trusts, or by such special legislation

as the Married Women's Property Act. More general regulations are usual in modern states. The Federal Code of Switzerland recognizes three dispositions of property between husband and wife, one of which must be adopted by the parties contracting marriage. It is not easy to determine when such laws pass the bounds of legitimate dispensation, and become direct contradiction of the natural order. They may easily destroy, in those subject to their influence, the sense of mutual dependence and support without which the good of marriage cannot be realized. They do not, however, necessarily prevent the complete fulfilment of the natural law by the voluntary action, joint and several, of the parties to a marriage, who may nevertheless hold themselves free in conscience to take advantage of them in the case of necessity.

An abatement of social standing is expressly allowed in the case of morganatic marriage, or *Ehe zur linken Hand*, once fairly general but now peculiar to the princely houses of Germany. Such marriage is valid and complete in all respects, save that the wife, being herself of inferior birth, does not share the rank of her husband or property attaching to his rank. Similar in effect is the union known to theologians as *matrimonium conscientiae*, which is not clandestine in the sense of lacking the elements of publicity strictly required by law, but is secret in the sense of not being openly acknowledged or of public repute, so that it does not carry any of the social consequences attaching to a lawful marriage. By the constitution *Satis vobis* of Benedict XIV marriages of this kind were definitely regulated for the Churches subject to the papacy; but the recognition of such an arrangement goes back to the beginnings of Christianity, and is illustrated by those marriages of noble women with slaves, for allowing which Callistus of Rome was attacked by Hippolytus.

These various dispensatory laws may be approved in principle, there being no precise limits to the power exercised by any lawful authority in adjudging on cases of necessity; but in practice many of them will be found to be unreasonable and harmful to public morals. The Church itself has not an unblemished record in this respect. The majesty of the natural order has been impaired; willingness to endure the occasional hardships incidental to all strict observance of rule has been weakened; an ever extending laxity has shown how the practice of dispensation may eat out the heart of law. There is needed now, no less than at the first preaching of the Gospel, a return to the severity of the divine institution.

If we now turn to the other purpose of these contingent dispensations, we shall observe that the impediments of the natural law are hardly, if at all, subject to interference. Physical incapacity for marriage obviously cannot be removed by any exercise of authority. A contract between persons of inadequate age cannot set up a true marriage, but the formal contracting might be allowed, and has been allowed, with a view to renewal or completion when the parties become competent; and such a contract will certainly have whatever binding effect may be given to it by positive law. Insufficient consent is an irremediable cause of nullity, and no authorization of a pretended contract under conditions of force or fraud could have real effect; nor is *sanatio in radice* possible where there was no intention to marry. The impediments of previous marriage, however, and of consanguinity or affinity, are in a different case, for marriage, though forbidden, is not here naturally impossible. Can a dispensation remove the prohibition?

If the natural bar of consanguinity be effective only in the ascending and descending line, it may well be doubted whether any authority could justify a departure from the

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rule, a necessity of any kind being almost inconceivable. Unbridled lust has broken through even these barriers, but the common sense of mankind is unanimous in shrinking with horror from such incest. The corresponding bar of affinity is almost as impregnable in human experience; the effrontery of Absalom and the counsel of Achitophel exhibit a practice familiar in the record of Asiatic monarchies, but St. Paul's strong language testifies to the abhorrence with which such unions were regarded even in the most corrupt regions of Hellenic life.[1] In the doubtful case of marriage with a sister being equally contrary to divine law, there are many instances of dispensation, from Abraham downwards; but the Church has never granted one, and modern civilization shows no signs of breaking away in this respect from Christian tradition. The impediment of affinity in the same degree was long regarded in Christendom as equally immovable. Alexander VI is said to have been the first Pope who ventured on a dispensation, and this was justified by the growing conviction that the impediment was only *de iure ecclesiastico*. The contrary contention of Henry VIII of England, though fortified by appeals to the older practice and theory, was only a desperate device for establishing the nullity of his marriage with Katharine of Aragon. The surest ground is taken if we are content to say that the marriage of persons connected in the direct line is forbidden by natural law, and that no dispensation is possible, other impediments of this kind being referred to human law. But since there is a doubt whether some of these also be not founded in the divine law, the Church may well discountenance dispensation in such cases, and forbid Christians to act upon it, by whatever authority granted.

The prohibition of polygamy sets up the impediment of

[1] 1 Cor. v. 1.

previously existing marriage, or *impedimentum ligaminis*. Being already married, a man or woman may not take another consort. Polygamy is either simultaneous or successive. The strong feeling of the Christian Church against second marriages has caused the marriage of a widower or widow to be called successive bigamy, but the words are here used in the more natural sense of a marriage contracted while one of the parties has a husband or wife still living and separated by divorce. The two kinds of polygamy are both alike infractions of the divine law, but they are not on exactly the same footing.

Simultaneous polygamy has been allowed in many systems of law, but has never obtained a recognized standing in Christendom. To make it normal is to run so directly counter to the natural law that doubts have been entertained whether in that case true marriage subsists at all. An English Court of Justice has held that an Englishman contracting marriage with a Kaffir woman in South Africa, according to the rites and customs of her tribe, must have intended a polygamous union, and the marriage was on that ground annulled. But the common sense of mankind is against this judgment, and the Church has usually recognized the first wife of a polygamist as validly married to him, while demanding his separation from the rest as a condition of baptism.[1] There are those who contend that polygamy may be allowed, if not for Christians, still for others who have not the same succours of grace, on the ground of a moral necessity. It was for this cause that Luther and Melanchthon, alone among Christian teachers, permitted Philip of Hesse to take a second wife; their action, kept as secret as possible, purported to be a dispen-

[1] There are two alternative practices. One is to allow the husband to retain any one of his wives. The other is to invalidate all the marriages as essentially polygamous.

sation *in foro conscientiae*. St. Augustine pleaded for the patriarchs of the Old Testament a pure desire to fulfil the divine purpose by engendering the promised Seed, and seems to have held them on this ground implicitly dispensed and allowed to multiply wives. Henry VIII of England is said to have sought from Rome a similar dispensation with a view to begetting an heir male for the public good. But in every case the plea of necessity appears to break down; where it is urged with the greatest appearance of reason, for lusty peoples of imperfect civilization,[1] it leads to inevitable injustice, since the privilege of the rich and powerful positively diminishes the opportunities of marriage for the rest. The conclusion seems to be imperative, that dispensations for simultaneous polygamy, though given *de facto*, are naturally invalid, as being neither just nor necessary. A marriage founded on such dispensation is not therefore to be reckoned true marriage.

Successive polygamy is less odious. A husband and wife being legitimately divorced, most of the reasons urged against polygamy have little or no force to hinder either of them from taking a fresh partner. It is not therefore surprising that many systems of law allow the marriage of the divorced. Is this permissible on the plea of necessity?

A law which purports to effect the absolute dissolution of the marriage bond must be unconditionally condemned. It is not so much an infraction of the divine law as an impotent pretence, an attempt to alter a fact of nature, and a denial of the existence of that which exists. It may be compared with a law which should purport to destroy the kinship of a brother and a sister, of a parent and a child. But a law permitting the marriage of the divorced, even if it be falsely conceived in this sense by the legislature,

[1] As by Mr. E. D. Morel in his *Nigeria, its Peoples and its Problems*.

may be regarded from another point of view. It may be taken as dispensing with the impediment of *ligamen*, and so allowing a modified polygamy. Is this permissible ?

We must weigh the fact that such dispensations are granted, not only in communities which permit simultaneous polygamy and therefore cannot forbid this less odious kind, but also in the Christian Church. The Eastern Churches have for some centuries allowed certain divorced persons to marry. The practice has been severely blamed by Western authorities, but perhaps on mistaken grounds ; it does not imply, as seems to have been thought at the Council of Trent, that the bond of marriage is dissolved.[1] If that were the case, both parties would *ipso facto* be free to marry. But what usually happens is that permission to marry is grudgingly accorded to one party and withheld from the other. This can hardly be construed into anything but a dispensation, allowing marriage in spite of the impediment set up by the still subsisting bond.[2] It is then a dispensation for a kind of polygamy ; a serious breach made in the law of nature, but not a denial of natural facts, or a falsification of the real nature of marriage. A benevolent interpretation may bring within the same category the private Acts of Parliament enabling divorced persons to marry, which formerly dispensed with the general law for England, and

[1] Pallavicino, *Istoria del Conc. di Trento*, lib. xxii, cap. 4, explains how the Council, at the instance of the Republic of Venice, abstained from anathematizing those who taught that marriage is dissolved by adultery, and this to avoid offending the Greeks in the Venetian islands.

[2] This is clearly stated by Milasch, *Das Kirchenrecht der Morgenländischen Kirche*, p. 598. Treating the impediment of existing marriage as absolute, he adds : " Eine Ausnahme hiervon ist nur dann zulässig, wenn die bestehende Ehe aus einem gesetzlichen Grunde getrennt wurde, und dem betreffenden Ehegatten von der kompetenten Obrigkeit das Recht eingeraümt wurde, eine zweite Ehe zu schliessen." See below, p. 127.

are still in use for Ireland. A law, however, expressly purporting to dissolve the union of the married as radically as when it has been adjudged invalid *ab initio*, even if the dissolution be decreed at the discretion of a judge as a relief to one party, can hardly be so interpreted. It is nothing else but an assertion that by a legal fiction a natural relation has ceased to exist; in other words, a natural fact is not to be regarded as fact. A law like that of some American States, which purports to dissolve a marriage on the ground of adultery but forbids the adulterous party to contract a new marriage, is with difficulty reduced to any logical sequence. The adulterer is declared to be unmarried, but his previous adultery seems to be made a diriment impediment disabling him from marriage. It is impossible, in this connexion, to overlook a fantastic theory, propounded by some loose thinkers, that adultery *ipso facto* dissolves the bond of marriage. On this showing a husband or wife might cease to be married, without knowing it, through the secret sin of the other party; and either party could dissolve a marriage at pleasure by a deliberate act of unfaithfulness. It is sufficient to say that no system of law tolerates such an absurdity. The English law of divorce, though widely departing from the natural order, is even more in conflict with this theory; for the adultery of both parties, which should be more effective as a dissolvent than the adultery of one, may even prevent the issue of a decree of dissolution.

What is professedly a dissolution of marriage may thus in some cases be interpreted in a sense less contrarient to the nature of things, and taken as a permission to marry in spite of the impediment set up by an existing marriage. In face of the practice of a large part of the Church, the legitimacy of such dispensation can hardly be contested, and the nature of human authority compels the admission

that what the Church can do in such a matter can be done also by the State. But it seems clear that either power may forbid its subjects to act on such a dispensation given by the other power. There is not the same duty of mutual recognition as in the case of the creation of impediments, for this dispensation is nothing else but the recognition of a necessity, which may be contested on the ground of better knowledge. A man may know in his own conscience that a dispensation accorded him is bad, because not just and necessary; an authority which lawfully controls his social actions may equally decide that he is not free to accept the licence allowed him by an authority concurrent.

It will be observed that dispensation has here been spoken of throughout in a sense including far more than the specific graces issued to individual persons under that name within the limits of various legal systems. In principle it seems right to group together all the modes in which a human authority can derogate either from its own laws, or from the obligation of other laws, and even of divine law. The possibility of such derogation cannot be denied; its legitimacy may sometimes be in dispute; it is in all cases a dangerous interference. Frequent dispensation destroys the credit of law, and is tolerable only when a rigorous enforcement would for a time provoke worse disorder. Complete abrogation of a law, where that is possible, may sometimes be preferable. Where law must be maintained—and the natural law cannot be annulled—the plea of necessity justifies any relaxation; but this needs the most careful watching, lest there grow out of easiness a general habit of disobedience.

In these ways human law may reasonably vary from the divine law of marriage; by the addition of supplementary obligations, by a refusal to enforce natural obligations, by creating impediments obstructive or diriment, and by dis-

pensing in case of necessity. The rights of human society are not to be denied, but it is well to insist on a cautious and temperate exercise of them. To multiply either obligations or impediments is to multiply occasions for dispensation; a free and frequent use of the dispensing power in this field makes for ease and laxity in dispensing with natural law. The best marriage law for any community is one which adds as little as possible to the requirements of the divine law, and so affords the least possible foothold for dispensation.

CHAPTER IV

Of Marriage in Canon Law

THE Christian Church began, as we have seen, with an effective social organization, which involved the ordering of marriage, as of other incidents of social life. The contention of Rudolf Sohm has been sufficiently criticized by Harnack. According to Sohm, the essence of the Gospel lay only in the promulgation of an ethic and religious ideal; the Christian life was an effort to realize that ideal, which inevitably drew the disciples into social relations and gave birth to the Church; but the ministry and government of the Church was purely prophetic or charismatic; the subsequent development of a legal order and of an authority conveyed by succession was a corruption. There is an element of truth in this presentment. The first preaching of the Gospel was in this kind, but as a prophetic movement it aimed at a revivication and spiritualization of a compact social order already existing in the Jewish system, and the whole nation with the Diaspora was invited to participate. In that system prophetic and legal elements were combined; the preaching of the Gospel was a revival of prophecy, taking the form of a strenuous and uncompromising assertion of the divine purpose animating the natural order and dominating the legal order; but both the natural order and the legal order were assumed, and their continuance was postulated. Eschatological fervour might diminish the importance attributed to either,

but both were to go on at least until the proximate end of the dispensation. The legal system was on the one hand to be fulfilled with a new content, and on the other hand it was to be reformed; it was not to be destroyed. "I came not to destroy, but to fulfil," is one of the characteristic sayings of the Gospel.

It is true, therefore, that Christianity was at first a charismatic movement of reform within the Jewish system. But it soon became evident that the old prophetic doctrine of the Remnant was once more to be exemplified. As soon as the disciples began to call themselves the *Ecclesia* they showed a dawning consciousness of this fact, nor can there be much doubt that this use of the word had already been adumbrated in the more intimate teaching of the Lord.[1] As this consciousness of being alone the faithful remnant of the true Israel grew upon them, they seem to have gradually perfected an organization carried over in its main lines from that which had cast them out, but fulfilled with new ideas. The prophetic and the legal elements were contrasted, as always, but they were not in open conflict. St. Paul insisted, perhaps more strenuously than any other teacher, on the liberty of the Spirit, but he was also forward in promulgating canons of discipline for the faithful. The two elements were combined in his teaching, with no care for artistic symmetry. In regard to marriage, as in regard to other matters, he at once proclaimed as prophet the Divine Law, and as legislator gave his own commandments.

[1] The word in Matt. xvi. 18, xviii. 17, even apart from the question of the language used by our Lord and of its equivalent in Aramaic, might well be due to a casting back of later ideas, but Hort is certainly right when he says that "the application of the term ἐκκλησία by the Apostles is much easier to understand if it was founded on an impressive saying of our Lord."—*The Christian Ecclesia*, p. 9.

That was the beginning of the Canon Law of the Church, and its development has followed in order. It combines divine law and human law, distinguishing them clearly in principle, but without curiously determining the line of division. Some consequent uncertainty has left room for disputation, and that is at some times and in some places insisted on as divine law which has elsewhere and at other times been treated as human law subject to absolute dispensation or abrogation.

The practical importance of the Canon Law of marriage is increased by the fact that for some centuries it became not merely the rule of conduct for Christians as such, but also the almost exclusive regulation of marriage and of its incidents through the whole extent of Christendom. It was thus concerned with matters of secular import, such as dowry and the legitimacy of offspring. This state of things passed away, but some effects survived. The laws of marriage in modern European states, however much they may differ from the law of the Church, are derived from it and retain some of its characteristics. On the other hand, the Canon Law itself was affected by these alien functions; it was the care of marriage, above all else, which brought upon it the juridical stiffness and complexity of its later developments, and at the same time drove it to expedients for accommodation to the supposed necessities of human society. If the Canon law were essentially what it became after the twelfth century, there would be more force in the strictures of Rudolf Sohm.

Yet even the worst of these developments were not out of keeping with its origins. It issued as a new birth from the Judaic law, which in all its branches, and not in one only, was the whole of law for those living under it; and here also are found the same faults of legal hardness and moral accommodation. The Gospel was a protest against

both, and the circumstances of the formation and expansion of the Church kept them for some time at a distance. Christians had no organization recognized by the law either of the Roman Empire or of any of its component parts. The rules of Christian conduct, therefore, could not have legal effect in externals; for the ordinary purposes of civil order, the faithful were subject to various laws of marriage, from which they made no attempt to withdraw themselves except so far as obedience might be inconsistent with the moral teaching of the Gospel. Some martyrdoms were due to this difficulty, but as a rule the precepts of the Church concerning marriage did but supplement the existing law. When Callistus of Rome in the interest of morality allowed what was illegal, his action was contested, as we have seen, even by some Christians.[1] When Christianity was made a lawful religion of the Empire, and still more when it became the official cult, attempts were made, with less success than might have been expected, to bring the law into harmony with the teaching and practice of the Church; but even the legislation of Justinian, for all his professions of Christian principle, was far from achieving this end. The Canon Law of marriage thus remained distinct from the imperial law, which it eventually ousted, the entire control of the relations of husband and wife passing into the hands of the hierarchy. In the East, this change was not effected without serious modifications of Christian practice; in the West, the rules of the Church remained intact precisely because their acceptance as formal law was longer delayed; when they finally prevailed over the laws alike of the Empire and of the new Germanic Kingdoms, the hierarchy under the leadership of the Pope had won so dominant a position that they could be enforced in all their rigour, and whatever laxity ensued came only from internal causes.

[1] *Supra*, p. 73.

I shall briefly trace the origin and progress of the Canon Law of marriage, endeavouring to distinguish those parts of it which are concerned with the maintenance of the divine law and of Christian standards of conduct from those in which it has played the same part as any other legal system, thus preparing the way for the jurisprudence of the modern State.

Existing within the Jewish nation, from which it was slowly detached, and carrying on expressly the religious traditions of that nation, the Church was concerned with marriage in the first instance as it stood in the Jewish law. Of this there were two clearly marked divisions: the written law, known as Mosaic, and the traditional judgments of the Soferim, which were afterwards collected in the Talmud and digested by the Rabbinical schools. The Soferim, however, were as much concerned with the interpretation and with the casuistic application of the Mosaic statutes as with their own traditions, and the divisions of the law were thus linked in one.

The contractual nature of marriage was fully recognized in this law, though it contained many relics of an economy in which the wife was hardly distinguished from a slave, but it was no less clearly understood that a natural and sacred relation between the parties was set up by the fulfilment of the contract. "The act of contracting marriage," says a competent writer, "is termed *Kiddushin*, since by this act the wife is set apart for her husband, and rendered inviolable and inapproachable in respect of any other man." [1] But the contract was not equal, since polygamy was allowed on the man's side; it seems to have been little practised after the Exile, and was perhaps almost unknown at the time of the Gospel, but it remained lawful until formally

[1] Mielziner, *The Jewish Law of Marriage and Divorce*, p. 27.

forbidden by the Rabbinical Synod of Worms under Gershom ben Juda in the eleventh century. Moreover, the state of marriage was held to be entirely dissoluble by a guarded act of the husband expressed in a bill of divorcement.

The mode of contracting was not provided for in the Mosaic code, but was prescribed with some fulness in Rabbinical law. A mere verbal consent was not held sufficient; there must be an act, attended with considerable publicity. The act, indeed, was twofold; for espousals and nuptials were both required, with an interval of not less than thirty days in the case of a widow, of a whole year in the case of a virgin.[1] The espousal was not merely a promise of marriage, or consent *de futuro*; it was a real initiation of marriage, involved the unfaithful in the guilt of adultery, and could be dissolved only by death or divorce. The formality required was either a gift of money, with the words, "Be thou consecrated to me," or a written instrument (*Shetar*) conceived in like terms.[2] The presence of witnesses was essential, and according to the ritual law the betrothal was to be blessed with prayer. Of the nuptials which followed, the essential act was the conveyance of the bride from her own home to that of the bridegroom, or to a place representing his home, where she was received in the presence of at least ten neighbours, and was blessed either by the bridegroom himself or by one of the witnesses. The blessings, however, do not seem to have been regarded as essential for a valid union.

Marriage was guarded by impediments obstructive or diriment, some of which were Mosaic, some Rabbinical. Impediments of consanguinity and affinity are found in both divisions. Those actually mentioned in the Mosaic books were held to make an union incestuous, and void from

[1] The bearing of this upon Matt. i. 18 and Luke ii. 27 is obvious.
[2] Cf. Tobit vii. 14.

the beginning. Those added by the Soferim, whether by logical inference or for the purpose of safeguarding the law, were less peremptory in effect; espousals contracted in spite of them might be cancelled, but a consummated marriage must be dissolved by a bill of divorcement. The mode of reckoning kinship was not settled until a later period. "There was no bar," it has been said, "to union with close relatives on the father's side, and even down to the Babylonian exile such unions appear to have been common." [1] It is noteworthy that, while aunt and nephew were forbidden to intermarry, on the ground that an almost maternal kinswoman could not render wifely obedience, the marriage of uncle and niece was even commended.[2] The curious law of the levirate broke in upon the impediment of affinity for the express purpose of preserving inheritances. It died out; the originally dishonourable procedure of *Halizah*, by which the obligation was evaded,[3] came into general use, for it was considered doubtful, says Mielziner, "whether he who marries his brother's widow with other than the purest motives is not actually committing incest." [4]

Of other impediments, the prohibition of intermarriage with Gentiles was most important. In the oldest law the Seven Nations of Canaan seem to have been excluded; Ezra and Nehemiah extended the prohibition to all neighbouring tribes, the Maccabean priesthood made it applicable to the whole Gentile world. Espousals and nuptials were forbidden on Sabbaths, on festivals, and for several days following the Passover, but a breach of this rule did not invalidate marriage. It is remarkable that impotence, if due to natural causes, was no impediment, though the

[1] *Jewish Encyclopædia*, viii. 336.
[2] Mielziner, p. 39. [3] Ruth iv. 7; Deut. xxv. 7–10.
[4] *Op. cit.* p. 57.

sterility of a wife after ten years was a ground for divorce. Neither did the lack of free consent on the man's part invalidate the marriage contract, since he could have his remedy in divorce; but a marriage might be set aside if the bride could be shown to have acted under compulsion. In spite of this, a father could lawfully give his daughter in marriage even before the age of puberty, and the practice seems to have been not uncommon.[1]

Divorce was a privilege of the husband. According to the Mosaic rule, he could dismiss a wife on the ground of dislike, but only if he were able to allege some "uncleanness," or grave unseemliness, as the cause of disfavour.[2] To prevent hasty action the law required him to give her a Bill of Divorcement, which was her full discharge, enabling her to marry another man. The husband himself, in view of the permission of polygamy, required no such discharge. The schools of Shammai and Hillel hotly disputed the meaning of the uncleanness which would justify divorce. Shammai admitted only the case of moral delinquency or unchaste demeanour; Hillel allowed the husband to act on the ground of anything offensive or displeasing to himself. Morally, the opinion of Shammai secured the suffrages of pious Jews; but legally, the judgment of Hillel prevailed.

The law, whether written or traditional, was theocratic. This was both its strength and its weakness. On whatever ancient customs and institutions it had been founded, all was brought to the test of high prophetic inspiration. The wisdom and the prejudices accumulated during centuries of administration were thus purified, and reduced to an order in which the faith of Israel could see nothing less than perfection. God spoke in the law. "The Lord said unto

[1] There is a reflection of it in 1 Cor. vii. 36.
[2] Deut. xxiv. 1–2.

Moses," was the formula by which even trivial regulations were introduced. The judgments of the Soferim themselves were not so much decisions newly made as determinations of the Divine Will, and the most transitory provisions for the ordering of human life were regarded *in specie aeternitatis*. Political expedients were confounded with moral principles; wise precautions against the absorption of the People of God into surrounding heathendom were translated into fundamental laws of marriage, and, worst of all, accommodations to human imperfection were treated as express commandments of God. The preaching of the Gospel was inevitably a challenge addressed to this heterogeneous mass of legislation, as was shown in our Lord's treatment of the Sabbath, and what He did there He did also in regard to the law of marriage. He did not deny the authority of the constituted judges of the people; they sat in Moses' seat, and their judgments were to be respected; but the whole system was to be reformed by a reference to eternal laws. Confronted with the teaching of Hillel, our Lord condemned as lax even the stricter opinion of Shammai, and this by virtue of a reference to the original and natural institution of marriage.[1] In setting aside the Deuteronomic law of divorce as a mere accommodation to the hardness of men's hearts, He drew a definite distinction between the Divine Law and the Mosaic Law, referring the one to creative Will as seen in the order of nature, and reducing the other to its proper place among the authoritative ordinances of human society. So reduced, and reformed in accordance with the preaching of the Gospel and with the intimations of God's Holy Spirit, the Jewish law passed into the possession of the Christian Church.

Some changes are obvious. Divorce, if allowed at all,

[1] Matt. xix. 3–9, v. 31–2, and parallel passages.

was severely restrained; marriage seems to have been strictly forbidden to the separated parties while both were living, the natural indissolubility of the bond being thus rather implied than defined; the prohibition of marriage with aliens became an injunction not to intermarry with unbelievers. The only clear information that we have on these matters in the first age of Christianity is contained in some brief passages of the canonical Gospels, in one important chapter of St. Paul's first Epistle to the Corinthians, and in some casual remarks elsewhere made by the Apostle. It is impossible to construct a complete scheme of what was required or disallowed in Christians. Indeed, it may be inaccurate to say that any such scheme existed. Expositions of the Divine Law were doubtless given as needed, and questions about what was seemly were answered by the Apostles, jointly or severally, as they were asked. We see St. Paul so answering the Corinthians, and we may infer that the practice was general. It is possible that the express prohibition of fornication by the Apostles and Presbyters at Jerusalem [1] was a decree requiring married men to abstain from that intercourse with unmarried women which the Greek conscience freely allowed, thus making the offence of adultery identical in husband and wife. What stands out perfectly clear is the fact that rules were thus made; that is to say, that there was an incipient Canon Law of marriage, enforced by the discipline of the Church. From the age immediately succeeding that of the Apostles there survives one clear indication of such disciplinary control. "It is proper," writes St. Ignatius, "for those intermarrying to effect their union under the direction of the bishop, that their marriage may be after the Lord and not after their own lust." [2] Nothing could

[1] Acts xv. 29.

[2] *Ad Polycarpum*, 5. πρέπει δὲ τοῖς γαμοῦσι καὶ ταῖς γαμουμέναις

be less like the imposing structure of the later ecclesiastical law of marriage than this personal and pastoral control, and yet all is potentially contained herein. The rule of Christian conduct is customary, though some precepts are already written, and the bishop is supposed to have it *in pectore*; the development of a code is inevitable.

But the Christian rule did not purport to set aside public law, or to be a substitute for it. The apologists were clear on this head. They were constantly repelling the vague accusations of immorality to which Christians were subject. Athenagoras acknowledged the observance of a special law, saying that a Christian recognized as wife only such an one as he had married "in accordance with the laws enacted by ourselves," but in the Epistle to Diognetus it is emphatically alleged that Christians domiciled in Greek or barbarian communities adhered to the institutions of their neighbours, as in other matters of daily life, so also in respect of marriage. That the control of marriage by the Church was properly an exercise of penitential discipline is clear from the references to it in Hermas.[1]

The practice of dispensation, however, was not long delayed, being applied alike to the Divine Law, to ecclesiastical rules, and to the prescriptions of civil law. Origen, though condemning such laxity, recognizes the fact that some bishops in his time would allow a divorced husband or wife to marry while the separated party was still living; not entirely without cause, he confesses, in spite of the express prohibition of Scripture, if regard be paid to the

μετὰ γνώμης τοῦ ἐπισκόπου τὴν ἕνωσιν ποιεῖσθαι, ἵνα ὁ γάμος ᾖ κατὰ κύριον καὶ μὴ κατ' ἐπιθυμίαν. There is probably no reference to 1 Cor. vii. 39, *κατὰ κύριον* being wider than *ἐν κυρίῳ*, and covering obedience to all Christian teaching.

[1] Athenag.: *Leg. pro Christianis*, 33; *ἣν ἠγάγετο κατὰ τοὺς ὑφ' ὑμῶν τεθειμένους νόμους. Epist. ad Diog.*, 5. Hermas, *Mand.* iv.

infirmity of men not endowed with the grace of continence, and the worse evils that a strict observance of the law might engender.[1] The principle underlying the practice of dispensation is here laid down with the utmost precision, and the existing practice of the Eastern Church is anticipated. Dispensation from ecclesiastical rule is obscurely indicated by Tertullian, with the expression of distaste that might be expected of his unbending mind, in the case of some Christian women who had married unbelievers; he does not know whether to put this down to their own waywardness or to the double dealing of their advisers.[2] Dispensation from the requirements of civil law, enabling Christians to disregard them with a good conscience, is found in the debated action of Callistus, who allowed Christian women of high rank to intermarry with slaves.[3] It is significant that objection was taken to all such dispensations. They mark the gradual change of the moral teaching of the Church into a system of law, which must take account of exceptions as well as of principles. There is indeed, even in the canons of certain councils held in the early part of the fourth century, a noteworthy tenderness in dealing with some breaches of the Christian law. The ninth canon of Illiberris allows a woman who has left an adulterous husband, and married another, to be restored to Communion after the death of her true husband, or even sooner in case of necessity, apparently without requiring her to break with her new partner. The sixteenth canon imposes a penance of five

[1] Orig. *Comment. in Matt.*, tom. xiv. 23.

[2] Tertull. *Ad Uxorem.* ii. 2. "Miratus aut ipsarum petulantiam aut consiliariorum praevaricationen." The word *praevaricatio* seems to be used in its proper forensic sense, in which case the harsh and impetuous writer brings against the *consiliarii*, who can hardly be other than the ecclesiastical authorities, the odious charge of acting in collusion with the unbelieving party.

[3] *Supra*, p. 73.

years on those giving a daughter in marriage to a Jew or heretic, but says nothing about separation of the parties. In a like case the eleventh canon of Arles imposes on women so married only a brief exclusion from Communion, " ut aliquanto tempore a communione separentur." The tenth canon of the same council is even more remarkable. " De his qui coniuges suas in adulterio deprehendunt," it says, " et eidem sunt adulescentes fideles et prohibentur nubere, placuit ut inquantum possit consilium eis detur, ne viventibus uxoribus suis licet adulteris alias accipiant." It is recorded that a man who has detected his wife in adultery is forbidden by the Church to use the liberty of divorce and remarriage allowed him by the civil law, but no censure or penance is imposed on one who, under the excuse of youth, violates this prohibition ; he is only to be advised in the strongest possible terms to obey. This interpretation can be escaped only by a rendering which would refer the words *alias accipiant* to a concubine and not to a legal wife ; it will then follow that the council, while absolutely forbidding marriage to the divorced, reluctantly tolerates concubinage. Hefele, not observing the possibility of this rendering, sees in the canon a concession to the standard of morality set up by the civil law.

When the Empire became Christian, the civil law of marriage was gradually modified in a Christian sense. The process was slow, and was never completed, but there was in the Church an inevitable tendency to acquiesce, and still further to abate the severity both of witness to the natural law as clarified by revelation, and of insistence on the sacred canons. It must not be supposed, however, that the Christian rule was even approximately identified with the imperial law. Failure to observe the distinction vitiates much of the industrious learning which Bingham devoted to this subject ; he constantly confuses the legislation of the Theo-

dosian emperors with the contemporary canons of the Church. The real divergence was sufficiently recognized; consciousness of it appears in a canon of unknown source and date, erroneously ascribed to the Council held at Mileve in the year 416, which demanded an imperial law in support of the rule of the Church forbidding marriage after divorce.[1] The burden of sustaining this rule in face of an unsympathetic law, nominally Christian, was evidently oppressive. Some years earlier the First Council of Toledo regulated the standing of a concubine, but only as a matter of Christian discipline, and on the same ground required a consecrated virgin who had contracted marriage to separate from her husband, without calling in question the validity of the marriage. But about the same time we find Innocent of Rome going a step farther. In a decretal letter he claimed the right to determine a case of marriage, in which grave injustice would be done "nisi sancta religionis statuta proviserent." A wife having been carried off by invading barbarians, her husband married another, as allowed by law; on her return from captivity the Pope ruled that her husband was still bound to her, and must separate from the other partner whom he had taken.[2] To do this was to set the authority of the Church in direct conflict with the Civil Law, and that not merely by way of dispensation, as in the case of Callistus. Here is an order to do a specific thing.

These instances, chosen out of many, show three distinct lines of action in the Church: the restriction of ecclesiastical rule to a purely spiritual discipline; an attempt to bring the imperial law into agreement with Christian teaching;[3]

[1] *Conc. Milev*, can. 17. "In qua causa legem imperialem petendam promulgari."

[2] Innocent I. Ep. ix. ad Probum.

[3] In the legislation of Constantius and Theodosius the younger are instances of success in this line introducing into the Civil Law

and a bolder attempt to regulate independently incidents of social order. All three activities have continued or have recurred in the history of the Church down to the present day. The decretal of Innocent I. points implicitly to the whole ecclesiastical jurisdiction concerning marriage, exercised throughout the West during the Middle Ages, and still exercised in some parts of the East; the attempt to mould the civil law in accordance with Christian teaching has been resumed in modern England, while in other countries the Church has in recent times accepted the function of a purely internal and spiritual control of its own members. Our present task is to examine the first of these developments.

For the orthodox Churches of the East, the Quinisext Council in Trullo, A.D., 692, is an important turning point, as in other matters of discipline, so also in regard to marriage. It was now definitely ruled, contrary to a widespread practice of previous ages, that priests and deacons should not be debarred from the use of marriage, though they were forbidden to marry after ordination; and deposition was threatened, with a special reference to the Roman Church, in case any bishop should exact a promise of abstention. Bishops themselves, however, were forbidden to cohabit with their wives, who were required to retire to a monastery at some distance. Censures were provided for a priest who should bless unlawful nuptials, and the pretended union was to be dissolved. A monk attempting marriage was to be treated as a fornicator. A rule of spiritual kinship was established, by which a sponsor at baptism was forbidden to marry the mother of his god-child, the marriage being treated as void. In explicit extension of

the impediment of collateral affinity. *Cod. Theod.*, iii. 12, *De incestis nuptiis.*

rules laid down by St. Basil the Great, marriages of uncle and niece, or of father and son with two sisters, and conversely, were made unlawful, separation being enjoined. The prohibition of marriage with unbelievers was extended to the case of heretics, but the marriage of two unbelievers or of two heretics was to stand good after the conversion of one party, on the ground of St. Paul's saying that the unbelieving husband is sanctified by the wife. Attempted marriage after divorce was declared to be adultery, as also was marriage contracted after a long absence of husband or wife; in this case actual proof of death was required to make marriage lawful, but some freedom was allowed to the wife of a soldier, whose death might be presumed; should he return after her marriage to another man, he was left free to resume cohabitation with her or not, at his own pleasure, and all the parties were to be held free from blame. Espousals, no less than a completed marriage, were to bind under peril of adultery, and a precontract was thus made a diriment impediment of marriage.

The Roman Church rejected this council, and consequently, though several of its canons found their way into Western collections, its trenchant legislation about marriage became operative only in the East. The divergence of the two parts of the Church in matters of discipline now became definite. I shall briefly note the development of the law of marriage in the East, and then return to the more complicated fortunes of the Western Church.

The legislation of Justinian had shown how far Christian doctrine could affect the law of the Empire, and left this sufficiently at variance with the canons of the Church. There were, therefore, two laws of marriage, perfectly distinct, and sometimes contradictory. There was no confusion of Church and State, though there was a close alliance, the Church being on the whole subservient. After the Quini-

sext Council, however, the canonical rules about marriage were enforced with considerable strictness, and gradually became predominant, as regulating social action, over the Civil Law. In the year 893 the Emperor Leo the Philosopher, by his eighty-third Novel, enacted that a marriage blessed by the Church should alone rank as legitimate. In 1306 Andronicus the Elder, in conjunction with the Patriarch Athanasius, forbade any contracting of marriage without the knowledge and intervention of the parish priest.[1] The Empire was now reduced within narrow bounds, but the influence of the Patriarch extended far, and in this way was established an ecclesiastical control of marriage which survived the fall of Constantinople, to become the fixed rule of the Ottoman Empire. Ecclesiastical marriage was henceforth the only kind of marriage recognized as valid by the State.

The Canon Law thus administered was codified at an early date. In the Nomocanon of John the Scholastic, Patriarch of Constantinople from the year 565, all the known canons of Councils, with sentences of the Fathers then generally taken as binding, were digested under fifty titles, Eastern Christendom being thus supplied with a systematic treatise of a kind for which the Westerns had yet to wait many centuries. Supplemented by new conciliar definitions, it was at length superseded in the year 883 by a new work in the same style, which became the definitive lawbook of the Eastern Church. The text was for some time treated as sufficient, but in the course of the twelfth century it was enriched with elaborate commentaries by Zonaras, Alexius, Aristenus, and Balsamon. In the thirteenth century, Arsenius of Mount Athos, afterwards Patriarch of Constantinople, set out the whole legislation of the Church

[1] Milasch, *Kirchenrecht*, p. 581.

afresh in a Synopsis of a hundred and forty-one chapters. About the same time was prepared a code, the *Krmčaja Kniga*, for the Slavonic Churches, which held an unchallenged position until Peter the Great forced on the Russian hierarchy some new legislation, affecting marriage as well as other incidents of the Christian life, in which innovation passed for reform.

The most striking feature of this codified system is the refusal to recognize as valid any marriage that is not contracted in complete accordance with law. Natural marriage by simple consent is not merely ignored, but strictly forbidden under pain of ecclesiastical censure ; a clandestine marriage is void. It is not any measure of publicity that will suffice ; the requirements are laid down with precision. The marriage must be blessed by the parish priest in the presence of two witnesses ; should the parties belong to different parishes, it is the priest of the bride's parish who must act, but he may delegate this function to another priest.[1]

Some minor requirements of the law alone may be neglected without voiding the marriage. The Eastern Church has always been reluctant to distinguish between the legitimacy and the validity of a sacrament, but the conception of obstructive impediments (*κωλύματα ἀπογορευτικά*), as distinct from diriment (*ἀνατρεπτικά*), crept in when the legal control of marriage fell to the ecclesiastical authorities. It should be observed, however, that even obstructive impediments are held to suspend the effect of marriage until they be removed by dispensation, which can be obtained from any bishop, and which appears to have the effect of *sanatio in radice*. This strictness makes it the less remarkable that force or fear inducing marriage is treated as an obstructive impediment only, a fact which may be due to the stress

[1] Milasch, pp. 582, 595.

laid on the nuptial benediction as compared with the consent of the parties.

Consanguinity within the seventh degree is a diriment impediment in the Churches of the Patriarchates, but in the Kingdom of Greece it is reckoned only to the sixth degree, in Russia to the fourth. Affinity is reckoned strictly to the fifth degree, and partially to the seventh, the extensions made by the Quinisext being still in force, but only to the third degree; the impediment of spiritual kinship, after undergoing some enlargement, has been brought back to the form in which it was recognized by the same council. Other diriment impediments are lack of mental capacity, impotence, the lack of parental consent where required, a religious vow of continence, the pregnancy of the bride under certain conditions, existing marriage, and a third widowhood. Marriage can be contracted in a first or second widowhood, but the parties are put to penance.

Diriment impediments can be dispensed with by a General Council only, or by an equivalent authority, the Patriarchal Council at Constantinople, for example, or the Holy Governing Synod of Russia. There seem to be no exceptions, and impediments are not distinguished as of divine or human law. It follows that all dispensations alike must be regarded as contingent, and conceded on the ground of necessity. Even the impediment of existing marriage is not absolutely irremovable, as is seen from the practice of the Church in case of divorce. Divorce itself, as we have seen, is in the nature of a dispensation from the natural law requiring community of life in the married, and should be allowed only for the gravest reasons of necessity. The Eastern Churches were long disposed, as may be seen from the canons, so-called, of St. Basil, to follow the Jewish law, forbidding a man to continue marital cohabitation with an adulterous wife, but in the fourth century Christians had not all learnt

to treat as adultery the sin of a husband with an unmarried woman, and his wife was not even allowed to leave him on that account. This inequality of treatment slowly and incompletely gave way. The Quinisext adjudged guilty of adultery the man who, after putting away his lawful wife, should marry another, but allowed some unspecified consideration for a husband deserted by his wife. It is probable that a licence to take another wife was intended. An elder contemporary of the Council was Theodore of Tarsus, the Greek monk who organized the nascent English Church; he did not forget his origin when he changed his tonsure, and his replies to questions digested under the title of a Penitential are full of references to Basil the Great and other Eastern authorities; in these we find permission to marry very freely accorded to a husband whose wife has left him with contempt, has been carried away captive, or has been put away for adultery, and even the adulterous wife might be allowed to take a new husband after five years of penance. These may have been concessions to a rude nation of neophytes, but they are not to be matched in other records of the West, and they were at least based on the practice of the Eastern Churches. When the legal regulation of marriage came into the hands of the hierarchy, divorce was much more severely restrained than under the Civil Law, but it was still allowed on various grounds, which have been much extended, especially in Russia, by more recent legislation. There is no pretence of actually dissolving the marriage. The bond remains, and the parties are not set free to contract another marriage at pleasure; but the ecclesiastical authority can give a licence to marry in spite of this impediment, and it seems to be granted pretty freely to those who ask.[1]

[1] Milasch, p. 598. See the passage quoted above, p. 104.

Two things remain to be noted. Preliminary espousals (*μνηστεία*) are reckoned essential to a valid marriage. If not blessed, they are revocable; if blessed, they so far partake of the nature of marriage as to constitute, in accordance with the ruling of the Quinisext, a bar to any other union. These provisions, however, are now of small importance, since the completion of the nuptials usually follows immediately upon espousal.

Holy Orders, in spite of the strict rule forbidding those already ordained to marry, is not made an impediment; marriage actually contracted by a priest or a deacon is not annulled, even provisionally, but the offender is deposed from the sacred ministry.

Thus, from the seventh century, or longer, the Eastern Churches have enjoyed a fairly consistent canonical regulation of marriage, and from the ninth century have been invested, by a definite Act of State, with its legal control. Two causes have contributed to this result. The Catholic Church was for ages almost conterminous with the Empire, and the authorities of Church and State, in spite of fierce quarrels on occasion, lived together in mutual respect. The Church was sometimes dominant, as during the reign of the Palaeologi, sometimes unduly subservient; but the two powers, the two organizations of human society, have never been confused. A *modus vivendi* was consequently arranged, which could survive the transfer of the Empire to a dynasty professedly unchristian; the Church maintains relations with the Ottoman State differing but little from those in which it stood towards the Christian Emperors, becomes the acknowledged organization of all orthodox Christians in the curious system of nationalities by which that State is administered, and enjoys the undisputed control of marriage in regard to its own members. This principle of close alliance was carried with the Church to Russia and other coun-

tries beyond the pale of the Empire, where it still subsists. Outside the Turkish dominions, the regulation of the purely civil aspects of marriage is left ungrudgingly to the State, the regulation of marriage in its religious and sacramental aspect is left as unreservedly to the Church. The State, says the Bishop of Zara, may not treat as invalid a marriage recognized as valid by the Church.[1] He is not speaking only of a State the head of which professes Orthodoxy, for he has in view his own position under the Austrian monarchy; the principle is universally applied. In Russia, under the influence of the Church, it is extended to all religions, orthodox Christians having secured for others the privileges which they claim for themselves; marriage is treated throughout the empire as a religious institution under the control of the various religious organizations, Christian, Jewish or Musulman, to which the people adhere.

While the Eastern Churches thus perfected their system, the fortunes of the Church in the West were very different. The Empire was broken up, Christianity extended to the Northern nations before it was completely organized, and the religious control of life, in regard to marriage as in other respects, had to be worked out in a welter of confusion. Similar results were eventually attained, but after long delay, and with one most important difference.

The Western Churches found in the coming of the barbarians at once their trial and their opportunity. They were confronted not only with the venerable system of Roman law but also with customs and practices which had no such prestige. The ecclesiastical authorities could act more freely in face of Teutonic kings, wielding an irresistible power of the sword, than against the mere words of

[1] Milasch, p. 582. "Der Staat kann eine von der Kirche als giltig anerkennte Ehe nicht als ungiltig betrachten."

a Roman Emperor who could barely defend himself amid the marshes of Ravenna; Roman citizens of the provinces overrun by invaders could lean upon their traditionary jurisprudence and the edicts of their nominal sovran, but Goths and Franks, Burgundians and Lombards, when they came within the borders of Catholic discipleship, were fain to accept the guidance of bishops and councils, or to resist with a growing consciousness of guilt. Resistance was general; the rude customs of the nations were not easily put aside, and some strange expedients of compromise were for a time tolerated by the Church. A new penitential system, based on the Germanic custom of penalties in money or money's worth, makes its appearance, replacing or complementing the method of spiritual censures; the mulct is a full discharge, and there seems to be a vast extension of St. Augustine's principle, "Fieri non debuit, factum valet;" but from the fifth to the eleventh century the steady persistence of the Church is making itself felt, and certain departments of human life are brought even externally under its control. Conspicuous among these is marriage.

The work was chiefly done by the continual exercise of a rather indeterminate discipline, enforcing with more or less efficiency the unquestioned rules and customs of Christianity. The records are obscure, appearing occasionally in the acts of martyred bishops, which reflect the general state of society perhaps more accurately than the particular features of the cases described. Something may be gathered, however, from the genuine acts of councils, the greater authority of which was invoked when individual bishops were lax, or overborne by the self-will of kings and territorial magnates. We find the second Council of Orleans, in the year 536, not only renewing the prohibition of intermarriage between a Christian and a Jew, but also peremptorily ordering the separation of the parties so united. The

Church was beginning to treat such a marriage as void in law; in other words, the prohibition was becoming a diriment impediment. The same council had occasion to forbid the dissolution of marriage for some obscure cause, *voluntatis contrarietate*. Some years later, the third Council of Orleans allowed the continued cohabitation of parties who had contracted an incestuous marriage, if it could be shown that they had acted in ignorance, as neophytes, and not in contempt of the divine or ecclesiastical order. In the year 556, a council held at Paris renewed against the King Clothaire the prohibition of marriage with a sister-in-law, specially condemning an offender who "sacerdotem suum audire neglexerit," and forbade the practice of claiming a woman in marriage, by assignment of the King, without the consent of her parents.

If the Popes seem to have had less to do with this work than might be expected, it should be remembered that after the middle of the sixth century they were held under strait control by the Emperors reigning in the East and their Exarchs at Ravenna. Great as was the veneration expressed and felt for the Roman pontiff, he was for a long period rather a force in reserve than a dominant factor in the life of the Church. St. Gregory the Great stands out alone from a list of insignificant personalities, or worse, as having any conspicuous effect on the growth of institutions; and of Gregory we have the letter addressed to Augustine of Canterbury in reply to his questions. Two of these concerned marriage. Augustine's question whether two brothers might marry two sisters indicates some lack of common information, and the Pope's reply that it might be done since there was nothing in Holy Scripture against it, seems by implication to put the prohibitions that were current upon a basis other than that of ecclesiastical canon or custom. To another question regarding consanguinity and affinity, Gre-

gory replied that the secular laws of the Roman State allowed marriages which the Church could not approve. The condemnation of them he founded partly on the Divine Law, with a reference to the Levitical prohibitions, partly on practical experience, with a curious assertion that these marriages were found to be infertile; he quoted also the testimony of St. John the Baptist against such unions. Englishmen, however, who had contracted incestuous marriages before their conversion, were to be treated with gentleness; they were to be admonished to abstain from the use of marriage, not without warnings of eternal punishment to follow, but at the same time they were not absolutely to be denied baptism or required to separate under pain of excommunication, for they must not be punished for offences committed in time of ignorance. The Church tolerates some things, and discreetly connives at some things, wrote the holy pontiff, with a view to their ultimate suppression. But in the faithful such things were to be sternly repressed.[1]

If the questions of Augustine illustrate the perplexities of Roman Christians in face of the customs of the new nations, the Pope's replies, with their curious inconsistencies and halting assertion of principle, show how far the Church was even yet from having a clearly defined marriage law, and how tentative was the control then exercised. It should be observed also that the Church and the *Respublica* are still regarded as two mutually independent and even antagonistic powers. In the Gothic Kingdom of Spain the difference, and even the distinction, of the two powers tended to disappear, and legislation of all kinds was effected by councils

[1] Bæda, *Hist. Eccl.* i. 27. The letter was once considered almost certainly inauthentic, but a careful study by Mommsen (*Neues Archiv. der Gesellschaft für ä.d. Geschichtskunde*, vol. xvii., pp. 387 seqq.) has put another face upon it. See also Dudden, *Gregory the Great*, vol. ii. p. 130.

which may be regarded, according to the business transacted, as ecclesiastical or civil. The same union or confusion appears in the Frankish Kingdom under the Karlings, and the results may be studied in a long series of Capitularies. The English Kingdoms learnt the same method, and the way was gradually prepared for the great conception of an unitary *Respublica Christiana*, which fired the imagination and dominated the politics of the eleventh century.

The political theory into which this conception was ultimately reduced by a poet and statesman like Dante, by the great canonists of the thirteenth century, and by the champions of the Empire in the fourteenth century, is not here our concern. These men worked upon a state of things actually existing; their theories followed facts; there was a practical system, involving intolerable friction, but holding the field to the exclusion of any simpler device. Western Europe was a real political unit, essentially Christian by profession, in which the distinction of Church and State had disappeared. Political philosophy sought a reason for this in the natural unity of the human race, redeemed in Christ; mankind was potentially gathered into the apostolic fellowship, and the actual state of things could be treated as an approximation to the ideal. But that was an afterthought; Christendom was a working unit before medieval philosophy came to the birth. The Empire played an important part both in the practical working of the system and in the development of theory, but the system was not an outgrowth from the Empire; it began while the Empire was in abeyance throughout the greater part of the West, it agreed neither with the traditions of the fourth and fifth centuries, nor with the conceptions of Justinian; the *translatio imperii*, the conveyance of the imperial dignity to the House of the Karlings, did but give a wider scope to methods that were already established under the Frankish monarchy. There was a

Christian community, loosely but effectively knit together, which might properly be called the Church, but in a sense larger than that of St. Paul, or even of St. Augustine; within this community was a tangle of local authorities, spiritual and temporal; there was a temporal chief, the Emperor, invested with shadowy and indeterminate powers; there was a spiritual chief, the Pope, exercising powers indeterminate and therefore capable of extension, but real and terribly effective. Such was the position when the Saxon Emperors by their personal exertions delivered Rome and the Church from enormous scandals, and so revived a power which was to dispute successfully with their successors the real headship of the world.

It is in connexion with this system that we must consider the absolute control of the law of marriage acquired by the Spiritualty during the Middle Ages. This jurisdiction must not be confounded with that which we have seen to be already established in the East. We are not to think of a power specially conceded to ecclesiastics by the temporal authority. There was, indeed, in England an exceptional jurisdiction of this kind in testamentary matters, unknown elsewhere in Christendom, which Lyndwood could found only by guesswork "super consensu Regis et suorum Procerum in talibus ab antiquo concesso;"[1] but the authority of the spiritual courts in matrimonial causes was part of the common law of Christendom. Neither must we draw too close a comparison with the action of Innocent I, cited above; for here there is no other law to be set aside by the rule of the Church. What we see is the final outcome of the assumption of supreme authority in such matters by the Church, which characterizes the Gallican councils of the sixth century. It has borne this fruit precisely because of an appar-

[1] *Provinciale*, p. 176, s.v. *Ecclesiasticarum libertatum*, and p. 263, s.v. *Ab olim*.

ent check in the mixed councils of the eighth century. The merger of Church and Kingdom in a single community has, after all, made a new differentiation necessary, and it takes the form of a differentiation of function within the body. The Church regulates marriage all through, but first as against the secular law of the Commonwealth, of Emperor or King, afterwards in undisputed sway as the universal organization which has swallowed up all forms of human society. In this second stage the control eventually falls into the hands of the Spiritualty. In England, before the end of the twelfth century, Glanvill has openly acknowledged the exclusive competence of the spiritual forum to determine the validity of a marriage.[1] The work is done by the same hands as in the first stage, by the bishops and their officials, and there is thus an appearance of identity, but the position is fundamentally changed. The spiritual authority is no longer opposing and correcting the law; it is making the law and administering the law.

This power of the Spiritualty in regard to marriage should be traced to its true cause. We must not, with some modern theologians and canonists, base it on a recognition of the sacramental character of marriage, for it was in full vigour before the doctrine of the sacraments was sufficiently developed and defined to produce such an effect. We must not refer it to the peculiar circumstances of Western Europe, for we have seen a similar result produced under other conditions in the East. It was probably due in the first place to the intimate connexion of pure morality with marriage law, and was established by the growing conviction that this was of divine and not of human ordering. The Divine Law was crudely conceived in terms of the Levitical books, but even so it conquered men's imagination. Of those sacred books

[1] Pollock and Maitland, *Hist. of English Law*, ii. 367.

the spiritual chiefs of the Church were the guardians and the interpreters, and they were no less the teachers and vindicators of morality; on both grounds they were the natural protectors of marriage.

They would have been this even had the confused jurisdiction of mixed councils and mixed tribunals continued. The differentiation of function which took its place threw everything into their hands. This differentiation, traditionally attributed in England to a single legislative act of the Conqueror, was part of a great and slow movement of thought, which culminated in the codification of Canon Law. In the West, as in the East, but with less publicity, collections of canons had existed from early times, and some were expressly approved by important councils. In the middle of the sixth century Dionysius Exiguus made a new departure by adding to the conciliar decrees which he gathered from all sources the decretal epistles of the Bishops of Rome that were preserved in the pontifical archives. Early in the seventh century, a collection of the same kind, doubtfully attributed to St. Isidore of Seville, was made and published in Spain. The ninth century saw the production of the forged decretals. In the year 1086 Anselm of Lucca put out a new and enlarged collection, and early in the twelfth century Ivo of Chartres composed his Panormia, or Pannonica, in imitation of the Pandects of Justinian. But something more was demanded. All these works were mere accumulations of disconnected matter, words of the Church uttered in varied accents of authority. In the year 1151 appeared the *Concordantia discordantium Canonum*, or Decretum of Gratian, which marks a new departure. It is a digest, laborious but uncritical, of all the heterogeneous matter previously collected; canons and decretals are no longer set down side by side, to be read independently or compared with one another by the reader; they are dis-

persed under systematic headings according to their subject, and illustrated by citations from Holy Scripture, by extracts from the writings of the Fathers and by comments of the author himself. The purpose of this study can easily be ascertained. Canon Law had hitherto been a mass of ecclesiastical traditions, maintained and administered by local hierarchies, agreeing with each other more closely than might be expected, but yet full of diversity, and kept in such unity as they possessed only by appeals to Rome and by the occasional supervision of the authority which the Popes had gathered to themselves in the course of ages. This customary law, residing in the breast of judges and administrators who had nothing else to guide them but a quantity of indeterminate records in the current collections, had given satisfaction because it was in keeping with the general practice of Western Europe. But the revival of the study of the Roman civil law in the eleventh century awakened new desires. In the schools of Bologna men read the *Corpus Iuris Civilis*, and found there an ordered system which made them dissatisfied with the confusion of the existing practice. The science of jurisprudence sprang into existence. An ecclesiastical Justinian, occupying the Holy See, might have produced a new Code, with Pandects and Institutes, but that was possible only in a time of peace and as the fruit of the long labours of jurists, and the Popes were engaged in arduous struggles which held their attention to the most pressing needs of the moment. This struggle however, while it hindered such a work, made the need of it more urgent. The Popes were standing firm against the growing power of the Emperor, and labouring to differentiate those spiritual matters which should be under the exclusive control of the Spiritualty. The recovery of the Civil Law, and the enthusiasm with which it was received, threatened an immense aggrandisement of the imperial power ; should the

German Cæsar become in very deed the Princeps of Justinian's laws, the Pope would play a subordinate part in the Christian commonwealth. The current laws of the Church must be systematized to meet this invasion. If the old code was put forward as representing a juristic ideal to which the whole administration of law should conform, and against which a floating mass of custom could not hold its own, a new code must be formed out of the current laws which should have the same advantage of compactness and accessibility, with the added weight of a more spiritual authority. What the Popes could not do a private student might at least begin, and Gratian's Decretum was born.

It had an immediate success. It was read and glossed. It took its place beside the *Corpus Iuris* at Bologna. It soon reached the incipient schools of Oxford, lagging behind its rival there by a bare decade of years. Within two generations the glossators had done so much work that their comments also had to be codified, and were reduced to common form in the *Glossa ordinaria,* which became an integral part of the text. After the glossators, the canonists, who were to the new code what the jurists were to the old. Sinibaldi Fieschi, afterwards Pope Innocent IV, was the father of them. If the glossators tried to ascertain the true sense of the text, the canonists laboured to expound it in application to cases, and to bring it into relation with current but uncodified usages. In the meanwhile, Gregory IX had summoned the industry of Raymond of Peñafort to digest in similar fashion the new matter which had accumulated by legislation since the time of Gratian. Boniface VIII and Clement V followed his example, and two further supplements completed in the year 1483 the *Corpus Iuris Canonici.*

This great digest was designed for a double use. It was a textbook for Canonists, the foundation of study and of

lectures in the Universities; it was also a practical guide for ordinaries and advocates in the spiritual courts. A considerable part of it is devoted to the law of marriage, which brought to those courts much lucrative business. It was at once the consequence and the furthering cause of a great revolution. The systematizing of the Canon Law has been described alternatively as the greatest triumph and the greatest disaster of the Church. Perhaps the two judgments may run into one. It was a triumph for the Church to impose its penitential discipline upon the unwilling as effective law, but in this triumph the Church may have suffered its worst loss. Spiritual discipline is concerned first with the good of souls, systematic law with the good of society. In canonical process the original end of discipline was nominally kept in view, and an offender was brought into court *pro salute animae;* but matters of a much more mundane character engaged the attention of ecclesiastical judges, who were compelled to use both the minor and the major censures of the Church for the enforcement of decrees that were remote from the affairs of the soul. When Popes arrived at the point of employing excommunication as a weapon of war in a quarrel with men against whom they had themselves taken up arms and formed alliances, they were following in the track by which the practice of the Canon Law had led them. Another fault of the system was a certain confusion of values. Men are prone to take legality as the measure of light, and the moral teaching of the Church was originally set over against a mere legality, requiring a service of love that could not be enforced. The law winks at evils which can be endured without public disaster, or which cannot be suppressed without dangerous disturbance of social order. When spiritual discipline passed into the category of formal law the moral witness of the Church was inevitably weakened. This would probably have happened, even if it had remained

a thing apart from mundane concerns ; but when the Church undertook the legislative and judicial functions of a civic community, the trouble was intensified. There was a recurrence of those evil results of Theocracy which we have observed in the Jewish system. The Church was at once teacher of the Divine Law, director of religious conduct, and legislator for the temporal needs of human life. All three functions are needed in respect of marriage, but they can be kept apart ; the concentration of them in the hands of the Spiritualty led to a blurring of boundaries. Canonists laboured to draw clear lines, but it was not easy for the common sort to distinguish between the immutable precepts of the moral law and the present requirements of a paternal government.

Decretals were law for the whole of Western Christendom. But they were imposed upon a vast body of unsystematic and customary law, varying from region to region, from realm to realm.[1] Now when this kind of thing happens, there may be various results. Customs may be overruled at once by written law, they may be slowly modified by the pressure of ordered theory, or they may stubbornly hold their own even to the nullification of the imposed law. From the time of Edward I we have been familiar in England with the principle that statute law overrides customary law. The reason is obvious. England, except for some local franchises, was an unitary kingdom, and statute law was the expressed will of the King and his people, who thus voluntarily abandoned any custom contrariant to the new legislation. But Christendom, though unitary in theory, was in fact minutely divided ; decretals came from a hierarchical

[1] It is the German distinction of *Juristenrecht* and *Volksrecht* (Gierke-Maitland, *Political Theories of the Middle Ages*, p. xiii.), not the English distinction of statute law and common law.

superior, who did not seek the consent of those concerned; must their customs give way? The answer of the canonists may have been due to the impossibility of enforcing in remote corners of Europe the decrees that issued from Rome, but that is only to say that in the true spirit of jurisprudence they took account of facts; whatever the cause, their conclusion for the negative was effectively received, and local custom contrariant to a decretal was held to bar its operation. A prescription of forty years was sufficient. In like manner a notorious desuetude of the same length of time might, under stringent conditions, abrogate a law previously in force.

It is evident that a custom of the Church may be either universal or particular and local, but when canonists speak of *consuetudo* without specification they mean the latter kind only, which they set over against the *ius commune*, or general law of Christendom. This law ran everywhere alike. We must not turn aside to the notion of a foreign Canon Law, foreign to each several country or locality, or native perhaps only to the Roman diocese, which would not be in force except where it was definitely received and confirmed by local adoption. This notion was probably borrowed from the circumstances of the Reception of the Roman civil law in Germany; it has vitiated much discussion of the subject in England, but has been put to final rest, one may hope, by the magistral work of Maitland in his essay on "Roman Canon Law in the Church of England." Yet Maitland's own presentment of the case was not flawless. He spoke of the decretals as "absolutely binding statute law," which they were not, since they could be nullified by contrary custom. He seems to have regarded such custom as an external obstacle, hindering the proper working of the Canon Law, to be evaded or accepted with resignation by ecclesiastical ordinaries. But local customs were not external to the Canon Law; they

were themselves part of the system. In a Roman court an English or a Danish custom might be imperfectly known, and a cause pending from one or the other country might be erroneously determined by reason of such ignorance, but if pleaded and proved it would be as good law there as in a local tribunal.[1]

The law of marriage was singularly uniform throughout the Western Church, but a right understanding of the nature of Canonical custom is required for the elucidation of one exception, the importance of which has been greatly exaggerated. According to the *ius commune*, a child born out of wedlock would be legitimated by the subsequent marriage of his parents. A custom of the realm of England put a certain restraint on the operation of this law, for in regard to inheritance such legitimation was not recognized. The reply of the barons, "Nolumus leges Angliae mutari," to the plea of the prelates at Merton, in the year 1236, for the reform of this bad custom, has been extolled as a declaration of national independence; but it was nothing more than a profession of blockish conservatism. It was effective, and to this day the injustice continues. In England alone, I believe, and in countries deriving their law from England, legitimation by subsequent marriage is disallowed. But the operation of the custom was confined within the straitest limits. The ecclesiastical courts, but for the special privilege by which in England they administered testamentary law, might probably have ignored it; as it was, they declined to recognize its validity, except only when determining questions of inheritance[2]; in purely spiritual

[1] There is useful criticism of Maitland in Mr. Ogle's book, *The Canon Law in Mediaeval England*, but Maitland's chief arguments remain uncontroverted.

[2] Even this exception is doubtful. See Pollock and Maitland, *op. cit.*; vol. ii., p. 378.

matters they followed the general law. But with this limitation the custom was recognized as a valid exception within the general law of marriage. To describe it as a custom of the realm and not of the Church, or as an external restraint put upon the law of the Church, is to set up a distinction which was not valid at this date. The realm of England was merely a local division of the Christian commonwealth, and a custom of the realm was a *consuetudo* existing within the Church.

This case apart, local customs affecting the law of marriage were few and unimportant. From the tenth century onward there was one law, finally digested in the *Corpus Iuris* and in the books of the canonists, for the whole of Western Christendom. This law contained all those divisions which have been set out above under the general head of Human Law. It remains to indicate briefly its principal characteristics.

Juridically, the law was administered by the bishops in their several jurisdictions, but there were numerous exempt districts, called in England " peculiars," which were wholly or partly withdrawn from the control of the diocesan bishop, and subject either immediately to the Roman See, to another bishop, or to an inferior prelate as ordinary. In the eleventh century the judicial work of a diocese was for the most part entrusted to the archdeacons ; later, the archdeacons themselves acquired an independent but subordinate jurisdiction, and their former work passed to the newly constituted courts of the bishop's Official and Vicar-General, these two offices being in England usually amalgamated under the title of Chancellor. In all cases alike the bishop was the source of authority, and capable of acting in person, but his officials became something more than delegates and exercised their functions *ex iure*. There was thus an extremely complicated judicature, concerned with the issue of dispensations and with the hearing and determination of causes.

There was a complete system of appeals, first to a provincial court acting with the authority of the metropolitan, and thence to the court of Rome. Moreover, some dispensations and some contentious causes were reserved to these higher authorities, whose courts thus became tribunals of first instance. In England, for example, a dispensation from the rule requiring marriage to be contracted *in facie ecclesiae* was granted only by the Archbishop of Canterbury. A dispensation from the impediment of certain grades of consanguinity and affinity was reserved to the Pope. I have shown cause for supposing that these limitations of the power of a bishop are in the nature of things inconclusive, and that a bishop cannot even by consent divest himself of the plenary authority of the apostolate. Appeals, reservations, and exemptions belong to an economy which is tolerated in the interest of order and good administration, and which a bishop is compelled to accept by the practical pressure of a power to depose him residing in the general episcopate. By the operation of this pressure, as also by the good sense of all concerned, a hierarchy of jurisdiction has been established in all parts of the Church, to be disturbed only under the greater pressure of circumstances demanding reform by revolutionary methods. In other words, ecclesiastical law, so far as it concerns the mutual relation of bishops, is founded on a consensual compact, from which any party has an inalienable right to withdraw. But the Canon Law of the Middle Ages did not rest upon this Cyprianic principle. It rested on the supposition of the Papacy, which must be distinguished in principle from any superiority vested by ecclesiastical custom in the Roman Pontiff. To the Pope was attributed a legislative and judicial power distinct from that of the episcopate ; and this doctrine, though not formulated until the period of the councils following the Great Schism, was producing fruit in action at least as early as

the tenth century. The privileges of exempt jurisdictions, the rights of metropolitans, the system of appeals, though traceable in history to local or general customs, were in juristic theory referred to that kind of papal concession which in some cases actually existed. Thus it came about that even the powers left to a bishop could be represented as vested in him by a revocable grant. The truer conception, however, could not be suppressed; and hence there were current two sharply contrasted opinions: the one that a bishop could dispense in all cases not expressly withdrawn from him; the other, that he could dispense only in cases expressly referred to him by law.

I here include the issue of dispensations among juridical functions because the more important kind, the contingent, must be regarded as belonging to the category of disciplinary judgments; and indeed absolute dispensations also, though in principle legislative acts, were in the medieval system granted as if by judicial process, distinctively known as that of voluntary jurisdiction. It was a mode of doing business to which the habits of the time lent themselves in many departments.

The contentious jurisdiction of the spiritual courts covered both the fact of marriage and its consequences. The most important cases were those in which the validity of a contract, and the reality of the resultant state of marriage, were in question. The existence of an impediment, the authenticity and legitimacy of a dispensation removing it, the ratification of a contract *per verba de praesenti*, the actual consummation of the marriage, were matters to be determined by evidence. The procedure of the ecclesiastical tribunals and their *regulae iuris* were borrowed almost entire from the Civil Law, which was already the object of keen study at the time when the system of courts was framed. On the validity of a marriage depended the legitimacy of the issue,

which was thus determined, directly or indirectly, by these courts. But the judge did not merely declare an invalid marriage to have no binding effect on the parties; he required them under pain of the severest censures to separate and live apart. The process was disciplinary, *pro salute animae.* It was, therefore, not only on a petition of one of the parties that a pretensed marriage could be annulled; the spiritual judge could proceed against them on the strength of any information received. Information might be laid by a person interested in bastardizing the issue, but the court ignored such motives. A party might, however, pray for relief from the responsibilities of a colourable, though invalid, marriage, or from the false assertion of a clandestine contract which would be valid; hence the suit for jactitation of marriage.

Second only in importance was the jurisdiction of the courts in the matter of divorce. In this case one of the parties alone might pray for release from the obligation of cohabiting in bed and board, the grounds for such release being determined by law. I have shown that release of this kind is in the nature of dispensation from natural law, and it was therefore given reluctantly on the score of necessity. More obvious was the right of the court, in case of unlawful separation, to require the parties under pain of disciplinary censure to resume cohabitation. A temperate control was exercised over the community of goods proper to the state of marriage; claims arising out of this were severely restricted when the parties had contracted clandestinely, and not *in facie ecclesiae*; the courts claimed the right, when annulling a marriage for certain causes, to assign one party a moderate alimony at the charges of the other, and a like provision could be made in case of divorce.

The effective sanction for all decrees of the courts was found in the infliction of spiritual censures. The foundation

of the whole procedure was disciplinary; and this became evident, however juristic the matters dealt with and the methods might be, when coercive measures became necessary. The coercion applied by the ecclesiastical courts was purely spiritual, the ultimate sentence for the recalcitrant being the major excommunication. This involved, even at the bottom of the hierarchic scale, the abuse of spiritual weapons for determining temporal disputes which was the source of conspicuous scandals in higher quarters. Already in the eleventh century St. Peter Damian protested in vain. The abuse continued, and became more flagrant. It was self-destructive, for the censures so misapplied lost their terrors. The malediction of the Church, reinforced by the public opinion of the faithful, which St. Paul found effective in the case of the incestuous Corinthian, proved insufficient for the maintenance of social order when it was invoked for the correction of minor faults in the general body politic. The Spiritualty had undertaken the administration of essentially temporal affairs, and needed the help of the temporal arm. That help was sought only in the last resort for the suppression of contumacy, and it was not sought in vain; the Christian commonwealth had to stand by its ministers. In England this temporal support took the form of the King's writ *de excommunicato capiendo*; a recalcitrant subject, who would not yield to spiritual censures, was imprisoned on the information of the spiritual judge until he should make submission. The ecclesiastical courts were thus made effective for the administration of justice, to the detriment of their spiritual character. Judges and other officials were secularized, being frequently clerks in minor orders only; the discipline of the Church degenerated into a business of police.

The legislation of the Church in regard to marriage was fairly complete before the codification of the Canon Law, and

few changes of importance were effected during the Middle Ages. The Lateran Council of the year 1215, however, drastically reformed the current practice in the matter of the impediments of consanguinity and affinity. From the sixth century onward there was an increasing tendency to look back to the Mosaic law as a permanent expression of the will of God, those provisions which seemed to conflict with this view being treated as prophetic dispensations. It thus became possible to acknowledge a Divine Law, distinct from the law of nature, which should bind only the covenanted people of God. To this Divine Law were referred the impediments in question. But there were two possible ways of reading the law. The prohibition might be confined to cases expressly mentioned in the levitical books, perhaps with the addition of others exactly similar, or there might be found some general law which could be applied to all cases alike. Both methods of interpretation were used, but the latter prevailed. The Church had previously made special prohibitions, additional to those set up by the laws of the Empire ; it now became usual to rely on the levitical rule forbidding a man to have carnal knowledge of one who was " near of kin to him." We have seen St. Gregory the Great definitely opposing this Divine Law to the laws of the Roman Commonwealth. But to apply the law it was necessary to determine the meaning of *cognatio*, and an interpretation was sought from the rules of succession in the Civil Law. According to these, cognates were recognized to the sixth degree, or in some cases to the seventh, and thus the kindred with whom marriage was forbidden included all the descendants of a man's sixth or seventh ancestor. But in the course of the ninth century the Latin Church, while adhering to the seventh degree as the limit, adopted a new method of computation, known as *Computus Germanicus*, which greatly extended the area of prohibition. Such a

law of exogamy was impracticable, and it is not clear whether consanguinity in the more remote degrees was treated as a diriment impediment. The practical inconvenience of the rule was remedied by a constitution of the Lateran Council limiting the prohibition to the fourth degree collateral, and making the impediment in all cases diriment. It was also made plain that consanguinity arising out of illicit connexions had the same effect as that arising out of marriage.

The impediment of affinity, derived by the Christian Church from the Mosaic law, declared by St. Paul to be recognized by Gentiles in the first degree,[1] but carried no further in the Roman civil law, was logically developed in the course of the eighth century in precise agreement with that of consanguinity. It was not based, as in the civil law, on the entire union of man and wife effected by a lawful marriage, but on the bare fact of carnal copulation, interpreted in the sense of St. Paul's saying that, "he that is joined to a harlot is one body."[2] A man was forbidden to marry a woman with any of whose kindred to the seventh degree he might have had unlawful connexion. Nor was this all, for the more artificial affinities recognized by the Quinisext Council passed current for a time in the West also, and a man contracted affinity, not only with those of his wife's or paramour's blood, but also with those of her proper affinity, and, further, with those related to her in this same fashion; a fourth kind of affinity was discovered by the ingenuity of theologians to exist between the children of a widow married a second time and the kindred of her former husband. These refinements were tempered to the fourth or second degree; but even so, in a lax state of morals, a man would be surrounded by a network of relations, secret

[1] 1 Cor. v. 1. [2] *Ibid.* vi. 15.

and avowed, which made lawful marriage almost impossible for him ; nor was it easy to ascertain that in seeking dispensation he had set out all the particulars requisite for its validity. The Lateran Council made short work of this intolerable state of things, and of the rich harvest for practitioners in the courts resulting from it, by sweeping away the artificial kinds of affinity and by reducing the impediment of natural affinity, like that of consanguinity, to the fourth degree collateral.

These reforms involved an important corollary. It was not pretended that the Church could modify the Divine Law, therefore the Council implicitly condemned the proposition that the abrogated impediments were of divine law. But it also weakened the contention that the levitical impediment of *cognatio* in general was of divine law ; for how could the Church, in that case, vary by an arbitrary decree the limit of kinship ? A return to the recognition of the law of nature as the only divine law of marriage was not then possible, and those who held to a separate *ius divinum* were constrained to limit the impediments of this law to the cases specifically mentioned in the Mosaic books, or to draw artificial distinctions between those very cases. There were consequent disputes which affected the practice of dispensation, and which set all Christendom by the ears when Henry VIII of England sought relief for a carefully burdened conscience.

Of minor legislative achievements of the Church it may suffice to mention three : the continuous attempt to put down clandestinity, the classification of impediments, and the regulation of procedure.

Under the last head should be observed the rule that a marriage *de facto* contracted, even if a diriment impediment be known to have existed, must be accounted good until sentence of nullity has been pronounced by a competent

court. Moreover, since process was always *pro salute animae*, with the express purpose of putting a stop to unlawful cohabitation, no proceedings could be instituted *in foro externo* after the death of either party had brought the wrong doing to an end. Canonists commonly trace this rule back to the twenty-fifth canon of the Gallic Council of Agde, A.D. 506, but the thread of connexion is slender. The council forbad men to put away their wives privately, on the ground of an alleged impediment, without referring the matter to the ecclesiastical authorities. The later rule would cover such a case, but it went further, and was a vindication rather of the majesty of law than of the sanctity of marriage. It had considerable importance as affecting the legitimacy of children, who could not be put in danger of bastardy after the death of one parent. Against the obvious merits of the rule must be set the fact, abundantly proved in experience, that by the skilful management of a collusive suit, prolonged if necessary by appeals on interlocutory decrees, a notoriously unlawful marriage might be upheld until death put an end to the procedure. In this, as in other ways, the intricacy of the marriage law and the cumbersomeness of canonical process gave an immense advantage to wealth unscrupulously used.

The distinction and classification of impediments, partly by positive enactment, partly by scientific determination, is one of the chief departments of Canon Law. We have seen that prohibition of marriage in certain circumstances was regarded as within the province of the Church from the beginning, but the right to declare a forbidden marriage null and void, or in other words to create a diriment impediment, was slowly and reluctantly alleged. Reliance was placed at first on a reading of the Divine Law which could hardly be maintained; an impediment so established was by an afterthought put on another basis when juristic studies

made a better analysis possible. Impediments diriment and obstructive were then clearly distinguished, and the power of the legislature to impose a prohibition of either kind was recognized. What was at first merely disciplinary changed its character when the discipline of the Church came to be employed for the legal regulation of marriage.

It is no part of my task to deal in detail with the legislation of the Church about impediments and dispensations, but it may be well to note as an illustration of method the treatment of the impediment of *tempus feriatum*. In the fourth century the Council of Laodicea had forbidden the celebration of marriages in Lent. The meaning is not quite clear; birthdays are coupled with marriages, and the canon may look rather to the usual festivities of the occasion than to the actual contract.[1] There is no ground for supposing the prohibition to be a novelty. Yvo of Chartres and Gratian cite a Council of Lerida as extending it to the whole period from Septuagesima to the Octave of Easter, and making the same rule for Advent and Christmastide, and for the three weeks preceding the feast of St. John the Baptist. What is here forbidden is *nuptias celebrare*, but it is added, "si factum fuerit, separentur," which seems to imply that the contracting of marriage at these times is forbidden, and that the impediment is diriment.[2] This council cannot be traced; no such canon was adopted by

[1] Can. 52. Οὐ δεῖ ἐν τεσσαροκοστῇ γάμους ἢ γενέθλια ἐπιτελεῖν. On γενέθλιον see Suicer. The reference is not to the *natalitia* of martyrs, since they are provided for in the canon immediately preceding. Hefele thought that the Emperor's birth-day festivities were intended. It may possibly be the anniversary celebration of his accession (γέννησις); or, since the word was certainly used of the *Encaenia* of a city, the dedication festival of a Church may be intended. But the association with marriage points rather to a private festivity.

[2] Yvo, p. 8, c. 142; Gratian, caus. 33, qu. 4.

the Council of Lerida in 524, and in the year 572 the Council of Lugo, also in Spain, was content with the rule of Laodicea, as rendered by Martin of Braga.[1] Everything included in the *Decretum* of Gratian had some weight in the formation of the practice of the Church, but there is no trace of any attempt to treat marriages contracted in defiance of this prohibition as null, and the prohibition itself was interpreted as concerned only with the solemnities of marriage. So it was ultimately defined by the Council of Trent.[2] These solemnities are enumerated in the *Rituale Romanum:* "nuptias benedicere, sponsam traducere, nuptialia celebrare convivia." It follows that marriage may be contracted within the seasons of prohibition, but the parties are forbidden to begin cohabitation until they have afterwards received the nuptial benediction. Such is the general law. There are, however, local rules, as in the diocese of Bruges, which forbid the contracting of marriage at these times.[3]

This example may serve to show the purely disciplinary character of ecclesiastical legislation about obstructive impediments. To invalidate a marriage is another matter, and it is here that the laws of the Church grew to portentous bulk and intricacy. Diriment impediments of the natural

[1] Mart. Bracar., *Collectio Oriental. Can.* 48.

[2] "Antiquas sollemnium nuptiarum prohibitiones diligenter ab omnibus observari S. Synodus praecipit." Sess. xxiv. cap. 10.

[3] De Smet, *op. cit.*, p. 300. It has been thought that a similar rule once held in England. The latest authority that I can find is in the Visitation Articles of Robert Booth, Archdeacon of Durham, *circ.* 1712, printed in the Appendix to the Report of the Ritual Commission, 1868, p. 682. But Lyndwood, cited by the Archdeacon, is clear that the prohibition does not extend to the contracting of marriage, apart from the solemnities. The contracting of marriage without the nuptial benediction, however, being strictly forbidden, the rule does in fact prevent contracting *in facie ecclesiae* except by dispensation.

law were recognized, and their juridical treatment was elaborately regulated. They were classified in two kinds: those affecting the validity of the contract—insanity, force or fear, and mistaken identity; and those rendering certain persons incapable of intermarrying—immaturity, impotence, existing marriage, and consanguinity or affinity within certain degrees. In respect of all these, the legislature had but two functions; to ascertain the precise limits of the prohibition, and to determine how far contingent dispensation might be allowed. Diriment impediments of ecclesiastical law, on the other hand, were subject to continual fluctuation. Some were adopted, as we have seen in the case of consanguinity and affinity, from a supposed divine law, and afterwards reduced to their true standing. The impediment of *disparitas cultus*, nullifying the marriage of a Christian with an unbeliever, was derived from St. Paul's teaching, and its diriment effect was not based on any conciliar constitution or decretal, but only on general custom. It was never extended in the West, as in the Eastern Church, to cover the case of heretics.

A vow of continence, taken in the cause of religion, may be considered an impediment to marriage even by the law of nature, but the Western Church was slow to regard it as nullifying a marriage contracted *de facto*. The weighty judgment of St. Augustine was against such a development. He advocated a stern treatment of those who, vowed to continence, afterwards married, but he refused to treat this vow as if it were a marriage to Christ, precluding any other union, nor would he allow those who thus fell away to be reckoned adulterous. With a characteristic distinction he said that their breach of vow was an evil even worse than adultery, but their marriage, as marriage, was good.[1] Indeed, there seems to be no text plainly declaring such mar-

[1] *De Bono Viduitatis*, 9–11.

riages null before the seventh canon of the second Lateran Council : " Huiusmodi copulationem, quam contra ecclesiasticam regulam constat esse contractam, matrimonium non esse censemus." Much confusion ensued on this, since vows of continence were many and various, until Boniface VIII expressly restricted the operation of the law to the case of vows solemnly taken in an approved religious community.

When marriage was first forbidden to those in Holy Orders does not appear, but the prohibition was undoubtedly general at the time of the first Nicene Council, where it seems to have been in debate whether even those married before ordination should not be interdicted from the use of marriage. The story of the intervention of Paphnutius has been discredited, but without good reason, and it is clear that the abstention from marriage enjoined by the Council of Illiberris in the year 305 was no rule of the Eastern Churches at any subsequent date. But the whole trend of Western thought was for some ages in the direction of the stricter obligation, and when the contrary practice had almost become established during a period of general disorder, the reform preached by St. Peter Damian in the eleventh century was accurately represented as a revival of neglected discipline. The frequency with which married men were raised with credit to the highest places in the Church is illustrated by the tragic history of the family of Hadrian II, himself the son of a bishop, whose wife and daughter were murdered by the husband of the latter, also the son of a bishop of great reputation. It was in the time of this married Pope that a provincial Council at Worms found it necessary to renew the rule of abstention.[1] After

[1] Can. 9. " Placuit ut episcopi, presbyteri, diaconi, subdiaconi, abstineant se ab coniugibus, et non generent filios. Quod si hoc

the unbridled excesses of the tenth and eleventh centuries, the renewed enforcement of this rule might well seem to be necessary for bare decency in the Church, and it could be secured only by the entire removal of married men from the sacred ministry. Thus marriage and ordination came to be regarded as sacraments mutually exclusive. But even in the heat of that fierce conflict, when married priests and bishops were on all sides being degraded and deposed, there is no trace of any theory or practice invalidating a marriage contracted by them, until a decretal of Urban II in the year 1090 suggests what was thirty-three years later enacted in the first Lateran Council.[1] Even then it was separation only that was ordered, and, seven years later again, Innocent II at Clermont reverted to the older practice.[2] Abelard, in *Sic et Non*, set out the contradictions current in his time. In the year 1139, the second Lateran Council put clerks in holy orders on the same footing as monks, declaring their attempted marriages void.[3] Yet Gratian almost contemporaneously affirmed both the validity of marriage contracted by a deacon, and the lawfulness of cohabitation if the sacred ministry were abandoned. Not even a vow of chastity, he averred, taken at the time of

decretum violaverint, ab honore clericatus pellantur." The chronology of Hadrian I is confused, but he seems to have been twenty-five years a priest, and some time longer in holy orders, when elected Pope in the year 867. As his daughter was not then married, it is difficult to believe that she was born before his ordination. Did he follow the Greek rule, and was it because of unwillingness to separate from his wife that he twice refused the episcopate? It seems not improbable.

[1] Can. 21. "Contracta quoque matrimonia ab huiusmodi personis disiungi."

[2] Conc. Claromont. A.D. 1130; can. 4. "Decrevimus ut ei qui a subdiaconatu et supra uxores duxerint, aut concubinas habuerint, officio atque beneficio ecclesiastico careant."

[3] *Vide supra*, p. 155.

ordination, could nullify the sacrament of a subsequent marriage.[1] This vow of continence had been for some time imposed by reforming bishops, and was expressly ordered by a French Council at Bourges in the year 1031. The practice did not continue, but Gratian's successors deduced from the fact of ordination under the existing law an implied vow, on which, disagreeing with him, they based a conclusion of nullity of marriage. Boniface VIII, in his decretal restricting the impediment of *votum* to vows solemnly taken, ranked with these the vow of continence expressed or implied in the acceptance of Holy Orders. It is still debated by canonists whether it is this or the bare fact of ordination which constitutes the diriment impediment.

We have already seen how the natural impediments of consanguinity and affinity were by turns extended and restricted down to the time of the third Lateran Council. A further modification was introduced when the Popes of the fifteenth century began to dispense in regard to degrees of kinship which had formerly been considered to come within the prohibitions of the Divine Law. It was clear that either the extent of the Divine Law must be narrowed, or a power of dispensation must be recognized exceeding all that had been previously known in the Western Church. A reform of the Council of Trent, fixing a limit for affinity by illicit connexion different from that retained where the connexion was by marriage, seemed to draw this impediment entirely into the province of ecclesiastical law.

The impediment of *cognatio spiritualis* was of this charac-

[1] Dist. xxvii. cap. 1. "Si vero diaconus a ministerio cessare voluerit, contracto matrimonio licite potest uti. Nam etsi in ordinatione sua castitatis votum obtulerit, tamen tanta est vis in sacramento coniugii, quod nec violatione voti potest dissolvi coniugium ipsum."

ter from the first. The rule of the Quinisext Council was not a new thing, for its appearance in the legislation of Justinian shows that it must have been long current in the Church. This artificial kinship was for a time greatly extended, in the West as in the East, but was afterwards gradually restricted to the minister of baptism or confirmation, the sponsors in either case, and the parents of the recipient of the sacrament. It has enriched the English language with the word *gossip*.

The impediment of *publica honestas* arose from espousals *per verba de futuro*, which, without receiving the character of inchoate marriage attaching to them in Jewish law and the practice of Eastern Christendom, were held to set up such a relation between the parties, that on the ground of public decency the rules concerning affinity should apply. The same consideration touches with even greater force a marriage duly contracted (*matrimonium ratum*) but not consummated, though here also no true affinity was set up by carnal union. There were prohibitions of this kind in the Roman law, based on the maxim, "non solum quid liceat considerandum est, sed quid honestum sit," but the impediment does not appear in Canon Law before the eleventh century. It played an important part in the intricate negotiations about the nullification of the first marriage of Henry VIII, for whom it was pleaded that his marriage with Katharine of Arragon was barred in this way, even if her marriage with his brother Arthur was not consummated.

The impediment of *crime* arose from adultery, or from the murder of husband or wife, committed under promise of future marriage. The parties to such a crime were in the ninth century at latest rendered incapable of intermarrying.

The existence of these many diriment impediments produced two inevitable effects. On the one hand, there was

a continual increase of the practice of dispensation. A stationary population, compelled to look for partners in marriage within narrow limits of neighbourhood, was entangled in a complete network of prohibitions, and a genuine necessity made much relaxation necessary. But dispensation, however justifiable, is the worst enemy of law. The Western canonists, who upheld in the letter the strictest observance alike of the natural law and of human law in regard to marriage, indirectly broke down all the safeguards of law. They never moved a hair's breadth from the doctrine of the indissolubility of marriage. They insisted with so much severity on the observance of the duties of the married state, that Alexander III disallowed refusal to cohabit even with a leper. But the intricacy of the law regarding impediments, the strictness with which it was applied, and the frequent occurrence of legal flaws in dispensations granted and received not always in good faith, made an immense number of marriages precarious. A marriage could not be dissolved, but it could often be annulled. The process *pro salute animae* afforded material for a chicanery by which, with the help of evidence that was seldom sufficiently verified, almost any inconvenient husband or wife could be repudiated. Facilities, just and wholesome in themselves, for legitimating natural children, did away with the main hindrance to these nullifications, since the children born of a marriage so voided were not necessarily reduced to the standing of bastards. This again reacted on the public estimate of marriage, which was hardly to be distinguished in its effects from an avowed concubinage. It cannot be denied that the medieval Canon law failed miserably as guardian of the holy estate. Its outcome is illustrated on some of the best known pages of history by the case of Henry VIII, and to represent as champions of morality and of the honour of marriage the

Popes, a Medici and a Farnese, who rejected his plea, is not less false than to picture the king as moved only or chiefly by the questioning of a sensitive conscience. He desired, partly on grounds of public policy, the annulment of his marriage ; grounds were alleged which it was common form to allow ; the facility with which the English clergy and the English people were detached from their secular dependence on the Papacy is explicable only by their anger at seeing a customary judgment of the Papal Court, affecting the succession to the Crown, withheld under the pressure of a foreign power. Because Clement VII was supposed to act at the dictation of Charles V his jurisdiction was defied. But this would have been impossible, had not the whole administration of the marriage law become vitiated at the fountain head. When the legitimated bastard of a Pope could marry the bastard daughter of a King of Arragon, with a duchy for dowry, and when their son could marry the bastard daughter of a Spanish archbishop, to become the father of Saint Francis Borgia—when this was accepted as a natural state of things causing no scandal, marriage might seem to be on the way to become an extinct institution. Yet the miserable story ends in holiness, and the indestructible vitality of the Gospel stands revealed.

The time was ripe for reform. The shock of alarming schism hastened it. Reforms were effected by the Council of Trent, one of which demands careful consideration.

Marriage could be validly contracted, as we have seen, with the slenderest formalities, without any public function, and without religious rites. But the Church had from very early days, if not absolutely from the beginning, contended for a public and reverent ministration, alike of espousals and of nuptials. At what date it was made a matter of discipline to insist on the contracting of marriage *in facie ecclesiae* cannot be ascertained. The practice was general

in Tertullian's day, but the vehemence of his language seems to imply that it was not as strictly pressed as he could wish, and he may have declared no more than his personal opinion when he said that a clandestine marriage might be reckoned no better than fornication.[1] The nuptials, rather than the espousals, seem for some time to have engaged the attention of the Church, cohabitation before the reception of a ritual benediction being severely condemned. When the whole administration of marriage came under hierarchical control, both espousals *de futuro* and the contract *per verba de praesenti* were required to be public *in facie ecclesiae*, and censures were imposed on those who began cohabitation before the completion of the nuptial solemnities. Clandestinity was then regarded, in a somewhat improper sense, as an impediment; and the word is correctly used if it be understood that the omission of any prescribed formality, including the publication of banns, renders unlawful the next step towards the completion of the matrimonial contract. In the East, as we have seen, Church and State agreed to follow the Jewish precedent of making clandestine marriages void, but in the homogeneous community of Western Christendom this was not done. Only by the Council of Trent was clandestinity made a diriment impediment. The change was contested on the ground that it affected the substance of the sacrament, which was the mere consent of the parties; but this objection called forth the obvious answer that it would apply equally to the creation of other diriment impediments *iure ecclesiastico*, for which there were abundant precedents.

A graver objection to what was thus done may be found in its practical consequences. The Tridentine reform re-

[1] *De Pudic.*, 4. "Penes nos occultae quoque coniunctiones, id est, non prius apud ecclesiam professae iuxta moechiam et fornicationem iudicari periclitantur."

quired a marriage to be contracted in the presence of the parish priest of one of the parties with two other witnesses. Failing this, the marriage was to be null. For the validity of the marriage the priest was required only as witness; no ritual was needed, and no official act. A marriage might be clandestine in all other respects; there might be no publication of banns, no previous notification of any kind; the parties might at any moment spring upon the parish priest and two other witnesses, declaring themselves man and wife; the marriage would be valid. Such is the purport of the decree *Tametsi*. But the strict requirement of the intervention of the *parochus*, or of some other priest deputed by him, especially when construed with the words *Ego coniungo vos* of the Roman ritual, encouraged the idea, foreign to all theology, that marriage is in some sort effected by the act of an official; and this idea became fruitful of consequences.

This was the last attempt at canonical legislation for Western Christendom as a whole. The *Respublica Christiana* was already in dissolution. Already it was recognized that decretals and conciliar constitutions would not run as generally as of old; there was, no doubt, a hope that the crumbling unity of the Church would be restored, but there were obvious difficulties at the moment, and it was expressly provided that the new decree should take effect only in those regions for which it might be specially promulgated. For the first time in seven hundred years or more, the unity of the marriage law of Europe was avowedly broken. It was inevitable, for Europe was in labour of the Modern State.

CHAPTER V

Of Marriage in the Modern State

BY the Modern State I understand that organization of Civil Society which has supervened upon the dissolution of the medieval system in Western Europe. In a sense, this is a return to an older order, but its form is partly determined by the discarded ideas, and still more by their impress on laws and institutions. That impress has been carried to the communities of the new world formed by emigration from Europe, and all the resulting states differ in certain characteristics from those of Eastern Europe which have never received it. In the East, the distinction of Church and State as two separate organizations at no time passed out of sight; the unity of the Church was insisted upon, though less strenuously than in the West, but the conception of an unitary world-state, in spite of imperial traditions, never arose; the *Basileus* of Constantinople, though he affected to despise the *Reges* of Italy or Germany, treated on equal terms with his neighbours to the North and to the East. In the West a vision of unity took possession of man's minds, and dominated their political action. The *Civitas Dei* was one, and all mankind potentially entered into it; Pope and Emperor were powers therein almost co-ordinate, kings and dukes and the like were powers indeterminately subordinate. If Boniface VIII claimed the supreme control of the two swords, one of which he delegated to temporal wielders, the partisans

of the empire or of the French monarchy claimed on the other hand no more than independent authority *iure divino* for their chief, without denying equal or even superior authority to the Pope.

The revival of the study of Roman law in the twelfth century brought into the existing system a savour that was not Christian, a conception of unity that was based less on human nature than on legal citizenship. The advent of Aristotle to the Schools of Paris a hundred years later was even more momentous. The Politics became a text-book alike of theologians and of lawyers, and the authority of the philosopher was irresistible. The word *civitas*, the word *societas*, took a new meaning, based, with insufficient historical knowledge, on that of the πόλις αὐτάρκης in Greek philosophy. The *communitas perfecta* became an object of critical speculation. The existence of this form of society was assumed, because Aristotle assumed it. But where was such a society to be found in actual fact? Men stumbled between the sublime ideal of a heavenly citizenship common to all mankind, and a confused mass of local jurisdictions. There emerged the conception of a commune or of a lord acknowledging no temporal overlord, where the necessary independence seemed to be found. Jealous attempts at such independence called forth jealous assertions of suzerainty, but political thought jumped with individual ambitions, and the segregation of States began. The empire sank to the position of one among many. But unity survived on the spiritual side, *plenitudo potestatis* being vested in the Pope. When the King of England declared that he acknowledged neither temporal overlord nor spiritual, the foundations were cast down.

The imperialists of the fourteenth century were not in this line of thought. William of Ockham and Marsiglio of Padua were still concerned with the relations of the

spiritualty and the temporalty within the unitary Society. Their essential contention was that the legislative function was vested in the temporalty; precisely, they taught that the *multitudo* had power to make its own laws, this power being ordinarily delegated to Caesar. Wickliff applied the same teaching to English conditions; but he confused the issue by proposing details of legislation which were unacceptable; when Henry VIII wished to make practical politics of these theories, he leaned not on their native exponent but on Marsiglio, of whose *Defensor Pacis* he procured an English translation.

The fever of the Reformation brought matters to a head. Perhaps the most honourable part of Luther's agitation was his revolt against the existing administration of the Canon Law, notably in regard to marriage. His burning of the *Corpus Iuris* at Wittenberg was a dramatic sequel to what he had written of the Babylonish Captivity. But he had nothing to put in the place of what he discarded, and in his system the Church as an organized society may be said to disappear. A one-sided conception of primitive Christianity was made the standard of practice: Sohm is the true Lutheran. The great juristic revolution effected by the Reception of the Roman civil law throughout Germany, and the ingenious identification of the local *Fürst* with the *Princeps*, completed this work, and the speculations of Marsiglio were outdone. So far as the Church retained any power of action, it was reduced to the function of preaching, of declaring the revealed will of God of guiding the conscience of rulers; all law was civil law, even in regard to the regulation of religious practices. The *Landeskirche* was the inevitable result. When the Protestant States of Germany had struggled into partial or complete independence, they inherited no conflict of Church and State, because the Church, as a body politic, was annihilated.

Not very different was the effect of the Helvetic reformation ; but here some shadow of the medieval polity remained. At Zurich and Basel the temporal magistracy took charge of the unitary community, reducing the ministers of the Word and the Sacraments to a subordinate position. At Geneva, under the guidance of Calvin, things took a different turn. Calvin was a jurist of the Schools before he became a theologian ; in the one capacity he was drawn to the conception of the sovran State, in the other he achieved a clear idea of the Church. A better exegete than Luther, who was dominated by a single thought, he saw that the canonical books of the New Testament imply the existence of the Church as a formed society ; his peculiar doctrine of the Invisible Church removed some difficulties out of the way, and he was able to formulate his conception of the Visible Church as a local gathering of professed Christians. The vital connexion of this body, by means of the true Elect whom it contained, with the Invisible Church and its ascended Lord, gave a dignity and a divine sanction to its human order ; it had not only a prophetic function but a regal ; it could rule. Above all, this society represented, however inadequately, a group of men separated by divine decree from the general mass of mankind, and therefore it was not to be identified even potentially with the mass. The Magistracy and the Consistory at Geneva worked side by side, in harmony because they were dominated by the same teaching, but in separation. They were not two functions of one City or Church ; the City and the Church belonged to different creations. The influence of Geneva extended into France, to the middle Rhine, and to the Low Countries ; Theodore Beza systematized it even beyond the measure of Calvin. In France it was almost continuously at odds with the royal Government, and the distinction of Church and State was thus made more pronounced. It

passed over into Scotland; Knox and the earlier Congregation of the Lord clung to medieval conceptions, but the new principle of separation found completest expression in the reported saying of Melville: "There are in Scotland two kingdoms, the Kingdom of James Stewart, and the Kingdom of Christ, wherein James Stewart is but a seely vassal."

The wars of the League in France affected the political thought of others than the Huguenots. Under this impulse the great Spanish Jesuits laboured to construct a social scheme in which the Catholic Church might stand secure against Valois indifference or Bourbon heresy. Their theories were not mere shifts for an emergency. Already at the Council of Trent Lainez had used his vast knowledge of antiquity in defence of an opinion which made the civil power an institution sharply distinguished from the Church, "a purely human institution for the worldly ends of peace and riches." [1] This teaching was opposed to imperialism in a new sense. It broke up the whole conception of human society on which the claims of the Empire were based; it treated the Roman *Ius Civile* not as actual and operative law, but as a philosophic digest of eternal principles of justice; for further elucidation it looked to the political theory derived by St. Thomas Aquinas from Aristotle, and found actual law in the legislation of several states, each one of which was a *societas perfecta;* the best of models was the Spanish monarchy with its theoretic constitutionalism. Over against these purely secular States, the Jesuit theologians set the Catholic Church, with the Pope its chief, as another *societas perfecta* absolutely distinct and separate.

Their teaching was carried by the counter-reformation into Italy and Germany and beyond. It helped to break

[1] Figgis, *From Gerson to Grotius*, p. 179.

up alike the Empire and the kingdom of Germany at the end of the Thirty Years War. The court of Rome, wedded to medieval precedents, assimilated it with difficulty; but it controlled the policy of Urban VIII, and many parts of it were fully accepted under pressure of circumstances; a new mode of action was found effective, and the Pope, from being the spiritual overlord of Europe, became one of a group of sovran princes, dealing with one another by the methods of diplomacy. It was here that the Churches in communion with Rome differed politically from the local Churches of the Calvinists. In both cases alike the principle of distinctness from the State was recognized, and was bound more and more to determine actual relations; but the isolated Calvinist Churches dealt each with the several State in which it was established, and with none other, while the Churches that looked to Rome had a spokesman of international rank.[1]

It is not to be supposed that men were generally conscious of the revolution in which they were actors. We look back upon it and see whither they were tending; we see the modern state coming to the birth. From the first we can see how the change affected the law and practice of marriage. Among the Protestants the control of marriage fell at once into the hands of the State. There was no rival jurisdiction; ministers of religion had no function but to direct individual consciences or to instruct rulers in the principles

[1] The new doctrine was at length sealed in the Encyclical *Immortale Dei* of Leo XIII: "Ecclesiam societatem esse, non minus quam ipsam civitatem, genere et iure perfectam." Observe also the following: "Quin etiam opinione et re eamdem probarunt ipsi viri principes rerumque publicarum gubernatores, ut qui paciscendo, transigendis negotiis, mittendis vicissimque accipiendis legatis, atque aliorum mutatione officiorum, agere cum Ecclesia tanquam cum suprema auctoritate legitima consueverunt."

of divine truth. "I advise," said Luther, "that ministers interfere not in matrimonial questions. First, because we have enough to do in our own office; secondly, because these affairs concern not the Church, but are temporal things, pertaining to temporal magistrates; thirdly, because such cases are in a manner innumerable; they are very high, broad, and deep, and produce many great offences, which may tend to the shame and dishonour of the Gospel. Therefore we will leave them to the lawyers and magistrates. Ministers ought only to advise and counsel consciences, out of God's Word, when need requires." [1] In point of fact, such counsel fell, for the most part, on ears deaf because preoccupied. The new enthusiasm for the Roman Law overmastered other influences, and marriage was regulated by the legislation of Justinian, with modifications imported from old Germanic custom. Luther aided this reactionary movement by his denial of the sacramental character of marriage. It was "a physic against sin and unchastity," but merely in the natural order. The state of matrimony was "the chief in the world after religion," [2] but it had no immediate connexion with religion, and was no more to a Christian than to any other. It was a civil contract, and nothing else; there were certain revelations of the purpose of the Creator in regard to it, as there were in regard to just dealing in the market, but in both cases alike justice was to be administered by the prince and his officers; the Church was not appointed to judge and rule in such matters. Here is one conception that has become fruitful in the modern state.

The Reformed of Calvin's school taught another doctrine. They also remitted the judicial control of marriage to the State, but they left little scope for legislation. Marriage

[1] *Table-Talk* (Hazlitt), No. 748. [2] *Ibid.* No. 721.

was for them a sacred thing, if not technically a sacrament. For all his stern predestinarianism, Calvin did not deny free-will in Luther's headlong fashion, or teach a depravity of human nature so complete that sin was entered into its essence. Marriage belonged to the civil order, but this order was subject to the law of God, and the law of God was to be read in the text of Holy Scripture. Marriage was here sufficiently regulated; here, and not in the Pandects, was to be sought the law of marriage. Ministers of the Word were to teach that law, magistrates were to learn and administer it. This immense claim, made by men who had no support of tradition, met with amazing success. Wherever the Genevan discipline spread, the courts of the State undertook the control of marriage, but they were themselves under the control of theologians. Rather may we say that the judges themselves became theologians. The jurists of Leyden worked out for them a new marriage law, scrupulously based on scriptural texts. It was simple and severe, affording little scope for dispensation, and allowing less. But reliance on the sole authority of Scripture was more apparent than real. The available texts, few and brief, required interpretation; and guidance was inevitably sought from Christian antiquity and from either *Corpus Iuris*. The glossators could not be ignored, and in the seventeenth century, when the first flush of revolt was over, Bronwer did not hesitate to quote even the canonists. Thus the whole doctrine of contract *per verba de praesenti* was taken over, and the principle of presumption of marriage founded on open co-habitation. A public celebration of the contract was, however, demanded in the interest of order, with the attestation of a magistrate, a minister of religion, or a notary; there were even those who contended for the necessity of this, arguing that an official minister of God was required, by whom in God's

name the parties should be joined together; but the contrary opinion, allowing the validity of a clandestine marriage, prevailed. The obligations of the married state were strictly enforced, and there was a tendency to make evasion or neglect a public crime; in Holland, separation from bed or board by mutual consent was punished with fine or imprisonment. The equality of the union, however, was seriously marred by rules deduced from Pauline texts in which a reference to the inferior position assigned by Greek or Jewish custom to the woman was read as a promulgation of eternal law. The greatest change of all was in the regulation of divorce.

Divorce was not made easy, as in Lutheran communities where the Roman Law became supreme. It was made extremely difficult. The Reformed theologians were never tired of inveighing against the laxity of the Canon Law in this respect; against the frequent decrees of nullity which multiplied impediments made possible, and against the separation from bed and board which was ordered sometimes on frivolous grounds. At first, in strict adherence to the texts of St. Matthew's Gospel, they made adultery—taking this as the true sense of *πορνεία*—the sole ground for divorce. Later, on the strength of an argument ingeniously derived from the *privilegium Paulinum*, malicious desertion was added. In both cases they asserted that the marriage tie was loosed, not by the decree of any human authority, but by the fact; the function of a tribunal was merely to ascertain the truth, and to give it forensic publicity; separation of the parties without this formality was an offence, not against individual morality, but against public policy. When desertion was the cause, however, the duty lay upon the judge of labouring for the reconciliation of the parties; only when there was proved and obstinate malice on one side should the breach of union be

recognized as final. Adultery also on the man's side was to be judged less severely than on the wife's side; it might be a mere passing aberration, accidentally disturbing the marital relation, but not necessarily destroying it; only when aggravated by peculiarly offensive circumstances, making it intolerable to a duly submissive wife, was it to be recognized as destroying marriage.

Divorce was thus treated as the result of a crime, and the guilty party was in every case to be punished, if not by death, then by banishment or imprisonment. Marriage was a holy estate, into which the parties were brought by the mere effect of their consent according to the will of God. There were no impediments but such as were imposed by the divine will, and this was finally expressed in the canonical Scriptures; there could be no dispensation, and nothing further was required for a valid marriage. A finding of nullity was therefore possible only when there had been no consent; impotence was no ground for annulling a marriage, because it was not mentioned as such in Holy Scripture. Only the crime of one party could relax the bond, and that only in cases expressly determined by the written Word of God. Where the Old Testament seemed to differ from the New, its prescriptions must be set aside as concessions made to human weakness in a time of ignorance, but withdrawn when the Gospel was preached.

In one respect only did the Reformed theologians depart from the standard of the New Testament, and then not without ingenious endeavours to square their practice with the text. They held that divorce was a complete destruction of the bond of marriage, leaving the parties free to marry afresh. They violently attacked the contrary doctrine of the canonists. The contention was a part of their polemic against the exaltation of virginity, and against any kind of regulated celibacy, in regard to which they

were in complete agreement with the Lutherans. Canonical divorce, being nothing but separation *a mensa et toro*, condemned the parties, they said, to life-long celibacy, and was contrary to the will of God. They did not run to the same lengths as Luther, who sometimes seemed to regard even voluntary celibacy as a sinful neglect of a duty imposed by the Creator, but they would have no trammels; they denounced as untrue and immoral the teaching of Catholics about the indissolubility of marriage, because it involved the consequence, where the parties were necessarily sundered, of debarring them from the holy estate. Human nature was too corrupt to stand without this support, and therefore divorce without remarriage was a direct encouragement of sin. The jurists of Leyden, who bore with impatience the limitations put on the *Ius Civile* by the faculty of theology, welcomed a doctrine which set them free in one respect to follow their chosen model, and all communities of the Reformed went back from the Christian tradition as completely as the Lutherans, to make of divorce a dissolution of marriage. Yet they did not return wholly to the dregs of Roman law; they did not make marriage a mere partnership, terminable at the will of the parties; the dissolution of the union was treated as the act of God, and of the judge as God's minister. It was a violent separation, said Brouwer; violent in that it tore asunder that which was naturally one flesh, entirely destroying for ever the bond of marriage.[1] Nor was the practice perfectly

[1] Brouwer, *De Iure Connubiorum*, p. 752. "Divortium definimus violentam matrimonii distractionem ex auctoritate iudicis post praeviam causae cognitionem factam animo perpetuam constituendi divisionem. . . . Dicimus divortium esse *violentam* distractionem, quia quoties interponitur, vi quadam rumpit unitatem carnis, quam perpetuam voluit coniugii natura, et ante votis sperarunt ipsi coniuges. *Distractionem* dicimus, ut indicemus ipsum

consistent. Restrictions were put upon the marriage of the guilty party, which yielded only after long debate to the demonstration of the absurdity of supposing that marriage could be dissolved for one party and remain binding on the other. There is no mean state between the married and the unmarried.

It must not be supposed that the law of marriage, thus taught by the faculties of Leyden, was law merely for the independent and sovran States of the Netherlands. It was there put into vigorous practice, defined and expounded by the most learned judiciary in Europe, but it was promulgated from the University as a law no less universal than that of the canonists which it superseded. It was even more absolute, for it was held to be wholly divine, and variable at the bidding of no legislature. Unlike the Lutherans, the Reformed tied themselves within no territorial barriers; they addressed themselves *urbi et orbi*. Their law of marriage passed intact into Scotland, where it still stands apparently unassailable. It passed even where their ecclesiastical polity and theology were less welcome; it has influenced England; its degenerate issue rules in most of the States of the American Union; it was not without effect on the Code Napoléon, and the effect has been transmitted into most of the States of the modern world. Its fundamental vice was to ignore nature, and to build on the narrow basis of that divine revelation which is intelligible only when read in connexion with the underlying natural order. To some extent this fault was corrected by the jurists, who were steeped in the Pandects and could not forget the Decretals; the school of Grotius was not prepared to treat natural law as of no account. But the

vinculum, ipsum ligamen, ipsum nexum matrimonii divortio solvi." He contrasts with this the divorce *bona gratia* of Roman law.

exclusive appeal to Scripture supplied the bones and sinews of the system, and it has lost authority in proportion as the modern state has learnt to look elsewhere for guidance.

This is the second conception that emerges from the ruins of the medieval Law of marriage. But that law itself continued to operate under new conditions. Where the hierarchy held its own, strengthened by the counter-reformation, the Canon Law was still administered; at Rome it was unchallenged, and in the newly established Sacred Congregations, to which the development of the Tridentine reform was committed, a new method of growth was discovered; there are no more decretals, but the accumulation of an immense mass of case-law begins. All was done as if no great revolution were in progress; it probably did not occur to one official in a thousand that his functions differed in any way from those of his predecessors in the thirteenth century. Yet from the time that Macchiavelli wrote of the *salute della patria* as superseding all moral obligations and all principles of justice, the very foundations of policy were changing. Macchiavelli said bluntly what other men were thinking secretly; he looked back to the Omnipotent State of antiquity, which the schoolmen had rashly brought into discussion, and he identified it with that Italian fatherland which he hoped to see united by methods of blood and iron under the rule of an efficient tyrant. In the presence of that ideal the dream of the *Civitas Dei* rapidly passed away; it was because the nascent States of Europe were taught their politics by Macchiavelli, that theologians hastened to disentangle the Church as a separate and independent society from the ruins of the past. The process was hastened by the calamities of France. When Leaguers and Huguenots were flying at each others throats and threatening a complete disruption of the kingdom, L'Hôpital and the *Politiques* sought a new basis of

national unity in a government avowedly indifferent. Following their lead, Henri IV thought Paris worth a mass, but would not be quit of his ablest Huguenot minister; the State was ostentatiously distinguished from the Church.[1] The fear of this had already moved the theologians of the League to insist on the distinctness of the Church; practice and theory went hand in hand. But the distinct State was not hostile to the distinct Church, and it was a part of the tacit agreement of separation that the control of marriage should be yielded to the Church. What had come into the hands of ecclesiastics because they were officials of the *respublica Christiana* remained in their hands when that political unity vanished away. There was not as yet a return to the practice of earlier ages when the State and the Church had their several marriage laws; the State, reserving its independent rights, conceded some of its proper functions to the Church. For France, the Edict of December, 1606, did this in express terms, preparing the way for the unhistorical theory of later jurists according to which the medieval practice rested on a sanction of the same kind.[2]

The Modern State, then, began its treatment of marriage in three several ways. It either took complete and independent charge, or took charge under the direction of the Church, or left the charge entirely to the Church. In considering this development, we are not concerned with the question whether the Church in question is Catholic or

[1] The separation of which I am here speaking must not be confounded with that of the *Loi de Séparation* of 1905. This was the severance of an alliance struck between two separate and independent societies by the diplomatic methods of the Concordat.

[2] The edict is cited by Pothier, *Traité du contrat de Mariage*, tom. ii. p. 94. "Nous voulons que les causes concernant les mariages soient et appartiennent à la connoissance et jurisdiction des juges d'Eglise, à la charge qu'ils seront tenus garder les Ordonnances." Compare the passage quoted from Pothier below, p. 195.

schismatic, orthodox or heretical. The distinction of Church and State, and the relations of the two societies, can be studied apart from these complications. The only doctrine to be ruled out of account is that extreme form of Lutheranism, reflected by much opinion current in England, which denies the real existence of the Church as an organized community.

The case of England, however, calls for separate consideration. The English Reformation must not be thought of as an insular movement, for it was entirely without originality, and was inspired throughout by the influences radiating from Saxony, from Zurich, and from Geneva; but circumstances directed the movement into a distinct channel, producing results not found elsewhere. One such result was a long delay in the separation of Church and State. England retained a medieval polity; it was a fragment of the unitary *respublica Christiana* surviving the general destruction. The conditions of the first breach with Rome determined a long future. Henry VIII did not merely quarrel with the Pope as King, but carried with him, by what art or violence need not be asked, the local hierarchy. It is difficult to say how far the nascent distinction of Church and State had penetrated into English thought; Henry determinedly put it back. He had no need to assert the independence of the State, since he was master of the whole, and he took care to prevent any assertion of the independence of the Church. The preamble of the Statute for Restraint of Appeals significantly declared that the realm of England was an Empire, with the king as its sole head, acknowledging no superior on earth; this realm was a single Body Politic, "divided in terms and by names of Spiritualty and Temporalty," each division having its proper functions and jurisdiction. The "English Church," the *Ecclesia Anglicana* of the Charter, is identified with the

Spiritualty, which "hath been always thought, and is also at this hour, sufficient and meet of itself, without the intermeddling of any exterior person or persons, to declare and determine all such doubts, and to administer all such offices and duties as to their rooms spiritual doth appertain." It is the medieval conception, reduced to the compass of a single nation. Other statutes, and in particular the Act for the Submission of Clergy, applied to this narrow area the larger ideas of Marsiglio of Padua; the king stepped into the place of legislator for the whole body politic, ascribed by imperialist lawyers and theologians to the Emperor, but he exercised this function, as required by English custom, with the advice and consent of a Parliament in which both Spiritualty and Temporalty were represented. This legislation was made supreme in all subjects alike, the specific legislation of the Spiritualty being subordinate; but the system was not quite symmetrical, since there was no specific legislation by the Temporalty.

The restoration of the Papal supremacy under Philip and Mary, had it proved lasting, would undoubtedly have induced that same distinction of Church and State which was beginning to manifest itself in Philip's other dominions; but the Act by which it was effected still spoke of the Spiritualty and the Temporalty in Parliament as "representing the whole body of the Realm of England," and legislated in regard to sacred things as effectively, if not as freely, as the Henrician statutes. Under Elizabeth, and afterwards, the bare suggestion of the distinction was treated as a treason against the unity of the realm and the majesty of the Crown. Strong as was the influence of Calvin, his central doctrine of the separateness and independence of the Church was rejected by all but a faction; even when Cartwright and Penry asserted it, they did so with such limitations, and with so much tendency to compro-

mise on the royal supremacy, that the consistent separatists who followed Robert Brown denounced them as little better than conformists. The question was argued out; Richard Hooker brought all his learning and rhetoric into action against Puritan and Papist alike who argued for the independence of the Church. He could not deny that Church and Commonwealth were "things in nature the one distinguished from the other," but he denied that they were "corporations, not distinguished only in nature and definition, but in subsistence perpetually severed." The names import things really different, "but those things are accidents, and such accidents as may and should always dwell lovingly together in one subject." He could not deny that "under dominions of infidels the Church of Christ and their Commonwealth were two societies independent," but he maintained that this state of things was temporary, and not according to the eternal order of God; "If the Commonwealth be Christian," he argued, "if the people which are of it do publicly embrace the true religion, this very thing doth make it the Church." The assertion of Allen that king and parliament could no more legislate for the Church than for the celestial hierarchies he met with an elaborate show of precedents in the contrary sense. It is certain that on the ground of history Hooker had the best of the argument; the two societies had actually been merged in one for centuries. What he did not see, or would not allow, was that the merger in its turn was become obsolete, that everywhere except in England Church and Commonwealth were returning to their mutual independence, and that this was in truth an order more natural and more permanent than that which he was defending. He turned to a perverse sense what he must admit. "It is undoubtedly a thing even natural," he wrote, "that all free and independent societies should themselves make

their own laws ; " and he could add that " when we speak of the right which naturally belongeth to a Commonwealth, we speak of that which needs must belong to the Church of God ; " but he countered this by the qualification that " this power should belong to the whole, not to any certain part of a politic body," and the body politic was neither Church nor Commonwealth in distinction, but both in union.[1]

Thus face to face with the new doctrine, clearly enunciated, Hooker rejected it, and his influence was potent to prevent its acceptance in England. But this influence was not singular ; something in the national temperament jumped with it, and the straitest Puritans, when free to follow their own bent in Massachusetts, set up a medieval polity, a theocracy in which the ecclesiastical element predominated over the civil. Not even the Independents, triumphing under Cromwell, could work out a consistent scheme of Church and State. The Restoration brought back the unitary system, with the added severity and intolerance of the Test Acts ; the Toleration Act did but allow dissenters a precarious footing in the State and left them in the position of political aliens, their unlawful exercise of citizenship being covered by annual Acts of Indemnity. As matter of theory, Beveridge taught with perfect clearness the separateness of Church and State, and the existence of their several systems of law, in the Prolegomena to his *Synodicon*, but this learned disquisition had no effect in practical politics. Not until the repeal of the Test and Corporation Acts in 1828 was the separation of Church and State reluctantly achieved. Even now, in England alone perhaps of all countries of the world, there are men who shut their eyes to facts and continue a stammering utterance of the categories of Hooker.

[1] *Eccl. Pol.*, viii. ch. 1 and 6.

In this survival of the medieval polity marriage remained for the most part under the control of the Spiritualty. The Act for the Submission of Clergy asserted the right of the whole body politic to set aside anything done by a part, and the whole range of the Canon Law was treated as the peculiar work of the clergy, being valid therefore only so far as it did not contravene the king's prerogative and the customary and statutory laws of the realm. This was in part an assertion of the canonical principle of *consuetudo*, but in the predominance given to statute law there was a new restraint of the Spiritualty, and the consequences were at once felt. Appeals to Rome were forbidden, and a large power of quashing sentences of the ecclesiastical courts, and of ordering justice to be done therein, was conferred on the Crown. These, however, were but means to an end; their object was seen in a series of statutes by which Henry, struggling with his matrimonial difficulties, opened one of the most sordid chapters of English legislation. There were three of these. The first, in the year 1533, was directed against the Queen Katharine and her daughter Mary. After exhausting the forces of diplomacy in the attempt to obtain a decree of nullity from Rome, Henry turned the tables with "An Act concerning the King's succession," which declared fifteen specified kinships and affinities to be diriment impediments by Divine Law, without possibility of dispensation. His marriage with Katharine, validated only by dispensation, was consequently annulled, and Mary was excluded, as illegitimate, from the succession to the Crown. To safeguard his marriage with Anne Bullen, however, Henry limited this indispensable impediment to cases "where marriages were solemnized and carnal knowledge was had." Three years later it was Anne's turn to be repudiated, and an Act of 1536 removed this limitation, so that Henry's marriage

with her might be annulled on the ground of his illicit connexion with her sister Mary; Anne's daughter Elizabeth was thus rendered illegitimate and excluded from the succession. In 1540 the king's scruples were more intricate. He had just got rid of Anne of Cleves on the ground of her precontract with the Duke of Lorraine's son, but this precedent was awkward, since Henry, himself a much contracted man, was proposing to marry Katharine Howard, who also not improbably had some similar experience. Therefore a third Act renewed the Parliament's earnest protest against the iniquity of papal dispensations, and provided that in future precontract should not be an impediment to marriage. The statute was so carelessly or so skilfully drawn as to include in the reform not only espousals *de futuro* but also contracts *de praesenti*, where consummation had not followed. But further, Katharine Howard was first cousin to Anne Bullen, and perhaps to other ladies whom the king had honoured with intimacy; therefore a brief clause provided that "no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees." It should be explained that the fifteen kinships enumerated in the previous Acts were taken from the eighteenth chapter of Leviticus, with the addition of the wife's sister, doubtfully, or not at all included therein.

Here Henry rested, getting rid of Katharine Howard more expeditiously and being continuously satisfied with a third Katharine. The Act of 1540 was too scandalous even for his devoted servants, and it was repealed in the second year of Edward VI, the short clause, however, limiting impediments "without the Levitical degrees" being obscurely retained and confirmed. Mary and Elizabeth succeeded to the Crown, in spite of their illegitimacy, and in 1554 the three Acts above mentioned were unre-

servedly repealed, the canonical law of marriage being restored intact. Elizabeth, reviving her father's legislation, naturally omitted the two Acts designed to exclude her sister and herself from the succession, but confirmed the small fraction of the third Act which had been saved under Edward VI, vaguely restricting diriment impediments to those of God's law, and still more vaguely referring to the Levitical degrees for guidance.

Much was heard of this restriction afterwards, but for a time it seems to have been neglected. Matthew Parker, as Archbishop of Canterbury, acted with entire independence. In the year 1563 he put out an Admonition directed against marriage within prohibited degrees, against clandestinity, and against marriage after divorce.[1] To this was appended a Table, setting out in detail sixty kinships and affinities which were declared to be diriment impediments according to the law of God. Of others it was obscurely enjoined: "In contracting betwixt persons doubtful, which be not expressed in this Table, it is most sure first to consult men learned in the law, to understand what is lawful, what honest and expedient, before the finishing of their contracts." This can be understood only on the supposition that there were other impediments of consanguinity and affinity, for which dispensation was possible, but that within the limits of the Table there would be no dispensing. The Table itself went far beyond the Levitical degrees of the statute of 1540. There seems to be no doubt that Parker, like many predecessors in canonical legislation, based his rule on the Levitical prohibitions, but enlarged them by a method of parity of reasoning derived from the Christian principle of the complete equality of the sexes. How foreign was this method of interpretation to the Levitical rule is shown by the marriage of nephew

[1] Cardwell, *Doc. Ann.*, i. 316.

and aunt being forbidden while the marriage of an uncle with his niece was approved.[1] Thus the Admonition was in two ways incompatible with the surviving remnant of Henry's legislation. It may be remarked also that it set the seal of illegitimacy anew on Elizabeth, whose strangely assorted character included a magnanimity that might scorn to interfere in such a matter.

Parker's Admonition was confirmed by a provincial constitution of the year 1571, with a significant distinction; in the case of the relations expressly mentioned in the book of Leviticus, together with that of a wife's sister, the marriage unlawfully contracted was to be dissolved by the bishop's authority; in all other cases marriage was merely forbidden, as on the ground of an obstructive impediment. In 1604, however, a further provincial constitution confirmed Parker's list without distinction as based on the laws of God; all such marriages were to be judged incestuous, and the parties were to be separated by course of law. Nothing was said about the possibility of dispensation.[2] On this canon the spiritual courts acted without hesitation, but Sir Edward Coke now began his great campaign directed to the restraint of their activity by writ of prohibition, and much trouble ensued. It seems pretty clear that the canon was contrariant to statute law, and many attempts were made to confine sentences of nullity within the limits of the Levitical degrees. These were alternatively construed strictly or interpreted by parity of reason. In the case of a marriage between a man and his great-uncle's wife, annulled by the spiritual court, a prohibition was granted on the ground that this was not one of the Levitical degrees.[3] The conflict turned especially on the case of the wife's sister, which the temporal courts

[1] *Supra*, p. 114. [2] Cardwell, *Synodalia*, i. 130, 222.
[3] Gibson, p. 499. This case shows that the ecclesiastical courts

were unwilling to include, until in the reign of Charles II, they lighted upon the remarkable discovery that the surviving clause of the Act of 1540 involved a reference to the previous Act of 1536, which was thus incidentally revived, and settled the question.[1]

One other statutory change of the law may be noted. An Act of the second year of Edward VI did away with the impediment of Holy Order, though even the pressing need of Cranmer did not induce the legislature to make the reform retrospective. It was repealed in the first year of Mary, and was not revived until the accession of James the First.

The abortive *Reformatio Legum* would have brought the Marriage Law of England into almost exact agreement with that of the Reformed of Switzerland and Geneva, except that it retained the jurisdiction of the spiritual courts. So strongly ran for a time the current of opinion in favour of the absolute dissolution of marriage by adultery, that many persons in that case contracted fresh marriages, of whom the Marquis of Northampton procured, in the year 1551, the legitimation of his issue by a private Act of Parliament. From the year 1554 to the end of the century, we find the bishops continually endeavouring to check this abuse,[2] and in 1597 a canon of the Provincial Synod of Canterbury, renewed in 1604, required the judge of an ecclesiastical court, before passing a sentence of divorce, to take

recognized canonical impediments extending beyond those set out in Parker's Table.

[1] On so obscure and technical a subject I can but quote Halsbury, *The Laws of England*, vol. xvi., p. 283 : " The two former statutes, though repealed by stat. (1554) 1 & 2 Ph. and M. c. 8, may be referred to as explaining the stat. (1540) 32 Hen. 8 c. 38, which was confirmed by stat. (1558) 1 Eliz. c. 1 s. 3." See also Gibson, p. 496.

[2] See the Alcuin Club's *Visitation Articles and Injunctions*, vols. ii. and iii. *passim*.

bonds of the parties that they would not attempt to contract a new marriage while both were living. It being still doubted whether such a marriage were merely unlawful, or void by reason of a diriment impediment, Whitgift was asked, in the reported case of Foljambe, to certify the temporal court of the answer to this question, and he replied after consultation with competent theologians that it was certainly void.[1]

While the ordinary control of marriage, legislative and juridical, was thus left to the Spiritualty, we find the Temporalty also intervening, at first exceptionally, afterwards in more regular fashion. The equitable jurisdiction of the Court of Chancery was found available for determining some questions of property between husband and wife, in regard to which the ecclesiastical courts were powerless against the rigour of the common law. In the view of the common law, the property belonging to a woman at the time of her marriage, or accruing to her afterwards, passed entirely into the hands of her husband, who was thus the sole administrator of their common stock. A remedy for this inequitable rule being sought by the creation of a trust for the wife's benefit, the matter came within the cognizance of the Chancery, the practice and principles of which were almost entirely borrowed from the spiritual courts, and consequently there grew up a systematic jurisprudence by which an approximation to the true partnership involved in the divine law of marriage was eventually secured. Less admirable was the occasional intervention of Parliament. An Act of the first year of James I made simultaneous bigamy felony with pain of death, but was carefully drawn so as to exclude the case of a man or woman divorced. During the period of the Commonwealth, English practice was assimilated to that of most Reformed communities, and ten years after the

[1] Gibson, p. 536.

Restoration had brought back the Canon Law and the jurisdiction of the spiritual courts, a private Act of Parliament made a precedent looking the same way, which was the source of much evil. It was in the notorious case of Lord Roos.

In the year 1669 Lord Roos obtained from the spiritual court a decree of divorce on the ground of his wife's adultery. In the following year a Bill for authorizing his marriage to another woman was brought into the House of Lords, and debated at extraordinary length, being eventually carried through all stages by narrow majorities. Two bishops supported it, Cosin of Durham, and Wilkins of Chester; the rest opposed. The debate was almost entirely theological, the one side defending the position usually adopted by the Reformed, and alleging that adultery *ipso facto* dissolves the bond of marriage; the other side maintaining the actual discipline of the Church. There were, however, some variations; reference was made to the practice of the Greek Church; opponents of the Bill denounced the inequitableness and uncharity of allowing marriage to the man and disallowing it to the woman, "who whilst living may need marriage as much, or more than the man;" they attacked the vulgar error of "thinking that men have a greater preeminence than women," and the mistake of confounding permission, as in the Greek Church, with approbation; the permission, they argued, did not go beyond exemption from penalty. Lord Bristol said that he would support a Bill to legitimate issue *post factum* as in the case of the Marquis of Northampton under Edward VI, but not "a law *a priori* to encourage one to steal his neighbour's mutton, that is to establish wickedness by a law." Lord Lucas objected that it was a Bill for encouraging adultery; Lord Halifax that it was a Bill for encouraging perjury, "when it shall have this strong motive, viz., of being quit of a wife one is aweary of and the hopes of obtaining one one loves." Lord Essex

urged, on the other side, that this was an act of grace, that is to say, a mere dispensation, which no other person could demand *ex debito iusto ;* the supposed ill effects would not follow from a particular Bill for the relief of one person, which did not alter the general law. Lord Ashley made the remarkable assertion that " before the Council of Trent marriage was a civil contract, and managed by the civil magistrate." Lord Holles cited in favour of the Bill the statute of James I against bigamy, which excepted the case of those divorced by ecclesiastical censure.[1] The Bill was passed by the House of Commons with less difficulty, but not without great debate, and became a precedent which was followed with increasing frequency until the year 1857. Similar Acts are still passed for persons resident in Ireland.

I have thought this incident worthy of so much space, not only as an important precedent, but also as a turning point in the relations of Church and State. It is true that the distinction was hardly as yet even present to men's minds, and was not for many years to become effective in English politics. When Lord Bristol declared that the Church was against the Bill, he was not using modern language. " An essential right of the Church of England," he said, " is in danger of being overthrown by it, which is to determine in matters ecclesiastical." But he spoke of the Church in the sense of the Statute of Appeals, which he seems to have had in mind, and meant that the Temporalty was invading the province of the Spiritualty of the realm. The character of the debate made this plain ; the House of Lords talked like a Council of the Church ; the profligate Duke of Buckingham, Dryden's Zimri, quoted Bellarmine, and the satirist might have added to the characters of " fiddler, statesman, and buffoon," that of an amateur divine. Yet, looking back

[1] See the notes of the debates in Harris, *The Life of Edward Mountagu, First Earl of Sandwich*, vol. ii., pp. 318–32.

from the standpoint of a time when the essential separateness of Church and State is recognized, we may see in the whole proceeding an early step towards independent action of the State in regard to marriage.

The gradual emergence of the State is even more apparent in efforts that were made to restrain clandestine marriages. So long as the disciplinary jurisdiction of the spiritual courts was effectively supported, either by religious sanctions or by temporal coercion, regular marriage *in facie ecclesiae* could be more or less enforced. In the year 1598 Sir Edward Coke, at that time Solicitor General, was put to penance for marrying without publication of banns the grand-daughter of the great Burleigh, and escaped excommunication only by an absurd plea of ignorance of the law. The bitter hostility to the ecclesiastical courts which he afterwards displayed in Parliament and on the Bench, was probably due to this humiliation. But the growing practice of prohibition, furthered by Coke himself, and the abolition of the oath *ex officio*, seriously weakened this jurisdiction, and after the Restoration licence passed all bounds. Certain exempt places in or near London lent themselves more especially to the ecclesiastical performance of clandestine marriages; the registers of the Church of St. James, Duke's Place, one of these refuges of disorder, are said to have shown nearly forty thousand contracted in less than thirty years.[1] The difficulty of bringing these places under episcopal control induced the legislature to interfere, but with little effect. Under pretext of securing the collection of a stamp-duty, imposed on licences and certificates of marriage, any priest officiating at clandestine espousals was in 1694 made liable to a fine of a hundred pounds. This merely diverted the evil into a new channel; to broken clergymen, already in prison for debt, an accumulation of fines meant nothing, and there

[1] Burn, *Hist. of Fleet Marriages*, p. 4.

were always such in the Fleet or the King's Bench; a rich harvest of fees was here reaped by prisoners and gaolers, who afforded opportunities for hasty and secret marriages.

The habit of resorting to these disreputable devices was due to a doctrine, if we may not rather call it a superstition, which at this time invaded the Inns of Court. While divines and ecclesiastical lawyers maintained in their jurisprudence the sufficiency of a marriage contracted *per verba de praesenti*, without religious rites and even without witnesses, the common lawyers on the other hand were beginning to maintain that a marriage was not valid unless contracted in the presence of a clerk in Holy Orders. Two explanations of this have been offered. One looks to a maxim of Bracton: "No woman can claim dower unless she has been endowed at the church door." As the King's Courts had cognizance of marriage only in regard to such material accidents as dowry, they are supposed to have formed the habit of ignoring all marriages that for lack of due publicity failed to secure a woman this right. The other explanation looks to the unwillingness of the criminal courts in cases of bigamy to take note of anything but open and notorious fact, such as a public ceremony of marriage; they would not entertain subtle questions of marriage *de iure*. It is not clear when the new doctrine took definite form. It was not accepted in 1661, when a jury at Nottingham found a verdict for the legitimacy of a child of Quaker parents, who were accused of coming together like brute beasts with no form of marriage; on this occasion the court laid down the sound principle of law that the consent of the parties alone was sufficient for a true marriage.[1] But the contrary opinion grew, the person of a priest anywhere encountered being taken as equivalent to *ostium* or *facies ecclesiae*, until in the year 1844 the House

[1] Sewel, *Hist. of the Rise, etc. of the Christian people called Quakers*, ed. 1722, p. 292.

of Lords, hearing an appeal from Ireland, decided, says a caustic commentator, that "by the ecclesiastical and the common law of England the presence of an ordained clergyman was from the remotest period onward essential to the formation of a valid marriage." He adds the remark: "If the victorious cause pleased the Lords, it is the vanquished cause that will please the historian of the Middle Ages." [1] But the idea was not new. What the House of Lords affirmed in the nineteenth century was already mooted in the seventeenth century; the ecclesiastical courts in their regular jurisprudence recognized the validity of marriages contracted without the assistance of a priest, but the king's courts in their casual jurisprudence held such marriages at least doubtful. Parliament sustained the doubt, and while imposing the marriage tax on Quakers and Jews who should "cohabit and live together as man and wife," carefully provided that their unions should not on that account be construed as marriages good or effectual in law.[2] Persons, therefore, intending an irregular marriage were driven, for greater security, to procure the help of a clerk in Holy Orders, and the Fleet parsons flourished.

The scandal became increasingly intolerable until in 1753 the Chancellor, Lord Hardwicke, devised a drastic remedy. His Bill "for the better preventing of clandestine marriages" was carried through the two Houses of Parliament after acrimonious debate, and placed the contract of marriage on an entirely new footing. In brief, it enacted that any marriage contracted elsewhere than in the parish church of one of the parties, after due publication of banns, should be "null and void to all intents and purposes whatsoever," saving only the right of the Ordinary to dispense with banns

[1] Pollock and Maitland, *History of English Law*, vol. ii., pp. 372–383.

[2] Stat. 6 & 7 Will. III, c. 6. Gibson, *Codex*, p. 521.

and of the Archbishop of Canterbury to dispense by special licence with time and place. The Act also annulled marriages of persons under twenty-one years of age contracted in spite of the express dissent of parents or guardians made known after the publication of banns, or without the express consent of the same to the issue of a license. To prevent the treatment of a clandestine contract as espousals *de futuro*, it forbade the prosecution of a suit in a spiritual court to compel marriage *in facie ecclesiae* or the ground of such espousal. To check attempted marriages which would thus be invalid, the Act made it felony to solemnize matrimony otherwise than as allowed by law. Four exceptions were made; the Act was not to apply to the marriages of members of the royal family, to those in which both parties were Quakers or Jews, or to those solemnized beyond the seas.

The likeness of this legislation to that of the Council of Trent is obvious, and objections were taken closely resembling those put forward in that council. Henry Fox, who had himself nine years before contracted an irregular marriage in the Fleet, protested against "making so free with the laws of God and nature." [1] The power of Parliament to create a diriment impediment was challenged on the ground that marriage belonged to the spiritual order, and this contention was put forward from strange quarters. The bishops, on the other hand, supported the Chancellor, being troubled by the prevailing disregard of the ecclesiastical law. Horace Walpole, who wrote a contemptuous account of the debates in his *Memoirs of the Last Ten Years of the Reign of George II*, sneeringly remarked that, "Churchmen acquiesced in the legislature's assuming this power in spirituals." Looking back dispassionately on the heated discussion, we may see here a last act of the unitary body politic in which Church and State were merged. Churchmen did more than acquiesce;

[1] Cobbett, *Parliamentary History*, xv. 73.

they took an active part in promoting the measure, and in their own courts enforced its provisions with rigour. Lord Hardwicke's Act, indeed, went beyond the Tridentine legislation in the enforcement of ecclesiastical rule; for it required not only the presence of a parish priest as witness to the contract of the parties, but also his active participation. Marriage could not, save in the few excepted cases, be validly contracted elsewhere than in a parish church, and here it could not be contracted without the full ritual of the Church. Dissenters were therefore compelled to conform in this particular if they would be validly married; they lost the power, hitherto precariously enjoyed, of contracting after their own fashion, and their ministers attempting to solemnize marriage for them would be guilty of felony. The repeal or amendment of the Act was several times attempted both on this ground and because of the frequent nullities of marriage arising from its strictness, which gave notorious advantages to the seducers of ignorant women; in the year 1823 a new Marriage Act remedied some of the latter defects by allowing the validity of a marriage where the law was not knowingly and wilfully disregarded by both parties alike, but no attention was paid to the grievance of dissenters. They were soon to set this right by the effective separation of Church and State.

We must return on our steps to observe the results of that separation in countries where it did not lag so long as in England. In France, where its necessity first became evident, its effect also was soon apparent. The Tridentine rule had but little practical effect in the kingdom, but local custom and royal ordinances imposed even more stringent requirements, the presence of the curé and of four witnesses being necessary for a valid marriage. After the Wars of Religion, however, the existence within the kingdom of large bodies of Calvinists, not merely tolerated but accorded

definite rights by the Edict of Nantes, made it impossible for the emergent State to leave the control of marriage entirely to the Church. There were, in fact, two theories of marriage law concurrent, one of which demanded the active intervention of the civil magistrate. But further, the separate consciousness of the State as guardian of justice compelled action in regard to those incidents and accidents of marriage which touch the property or civil right of the parties ; it was impossible for the judiciary to avoid questioning the validity of an impugned contract, or to accept the certificate of the authorities of the Church as conclusive. Nor did the new distinctness of the Church secure it against the interference of the civil magistrate even within its own sphere of action ; the *appel comme d'abus*, which in the medieval system imported a jealous guarding of the limits of two jurisdictions within one community, became an instrument restraining the separate activities of the Church ; [1] In these two ways the various judiciaries of the kingdom took cognizance of marriage, and new royal *ordonnances* were soon found to be required for guidance.

A theory, juristic and theological, was framed for the defence of this legislation. The contract of marriage was distinguished from the sacrament ; as contract it was temporal and subject to civil law ; as sacrament it was spiritual, and subject only to the laws of the Church. To the king, as head of the State, was attributed the power of regulating the contract, of imposing conditions neglect of which would nullify it, and of judging its validity ; impediments created

[1] Pothier, *Traité du Contrat de Mariage*, tom. ii., p. 176, records an *arrêt* of Jan. 2, 1758, quashing the dissolution of a Jewish marriage decreed by the Official of the diocese of Soissons on the ground of the *privilegium Paulinum*. It should be observed that the *Coûtume de Paris* is law in Canada, and these extensive powers of the civil courts in ecclesiastical matters are still exercised.

by ecclesiastical law, and judgments of nullity pronounced by ecclesiastical authority, were properly concerned with the sacrament alone, and could not affect the contract except just so far as they were allowed or adopted by the civil power. This contention, it will be seen, implies not merely a logical distinction between marriage as arising out of a natural contract and marriage as raised to the supernatural value of a sacrament, but also the possibility of a real separation in fact; there might be a valid contract of marriage between Christians which would not have sacramental effect, and there might exist a sacramental marriage that was not founded on a valid contract. The distinction had been pressed by Melchior Cano and other theologians before the Council of Trent; practical conclusions were now drawn from it by French jurists. Billuart, accepting the distinction, tried to avoid the consequences, by showing that the sacrament does in fact depend upon the contract. "Sacramentum matrimonii," he said, "nihil aliud est quam contractus civilis elevatus ad esse sacramenti." [1] But in calling the contract *civilis*, rather than *naturalis*, he did but tender a fresh handle to his opponents, who were not slow to argue that a civil contract must be entirely subject to the laws of the State, the Church being concerned only with the sacramental effects flowing from its valid completion. So Pothier, who in the style of the eighteenth century read the ideas of his own time into the institutions of the Middle Ages, and attributed the legislative and judicial control of marriage by the Church to a revocable permission accorded by the Prince.[2] The influence of Pothier was great; he formed the

[1] Billuart, *Summa Summae*, tom. vi., p. 343. But see p. 54, *supra*.

[2] Pothier, *op. cit.*, tom. i., p. 29: "Le mariage n'étant somnis à la puissance ecclésiastique qu'en tant qu'il est sacrament, et n'étant aucunement soumis à cette puissance en tant que contrat civil, les empêchements que l'Eglise établit, seuls et par eux-mêmes, ne

opinion which grew to action during the Revolution, and his disciple Portalis, inventor of the doctrine that the curé was a minister at once of the State in regard to the contract and of the Church in regard to the sacrament, had a prominent part in the preparation of the Code Napoléon.

Before the Revolution, however, royal ordonnances regarding marriage were carefully drawn to avoid direct conflict with the sacred canons ; they were supplementary, or even ancillary. Some ingenuity was at times expended on conciliation ; thus an ordonnance for annulling marriages contracted without parental consent was made to coincide with the canonical impediment of *raptus*. Not altogether out of keeping with this caution was an order of the year 1787 appointing a special mode of marriage for Protestants, who since the revocation of the Edict of Nantes had lost their privileges and had become subject to the general law of the kingdom ; for the concession was cloaked as the exclusion of heretics from a right to command the services of a parish priest. But the practice then established was speedily made a precedent for wider legislation. Calvinism and Jansenism, surviving long and severe repression, became singularly active influences in the course of the Revolution. Calvinists had always regarded marriage as being within the province of the State ; Jansenists were imbued with the Gallican doctrine distinguishing the contract and the sacrament ; both contributed to the establishment of civil marriage in the first year of the Republic.

peuvent concerner que le sacrament, et ne peuvent seuls et par eux-mêmes donner atteinte au contrat civil. Mais lorsque le Prince, pour entretenir le concert qui doit être entre le sacerdoce et l'empire, a adopté et fait recevoir dans ses Etats les canons qui établissent ces empêchements, l'approbation que le Prince y donne rend les empêchements établis par ces canons empêchements dirimants de mariage, même comme contrat civil."

France led the way rather in thought than in action, for already in the year 1783 the Emperor Joseph II had promulgated decrees of this kind for his hereditary dominions, and in 1786 the diocesan synod of Pistoia had called upon his brother Leopold to do the same for Tuscany. In France the Constitution of 1791 clearly defined the attitude of the State : " La loi ne considère le mariage que comme contrat civil." This declaration of Gallicanism was the more generally welcome since the adoption of the Civil Constitution of the Clergy in the preceding year had worked to the serious disadvantage of strict Catholics. " A heavy blow was struck at their religious liberty," says M. Paul Viollet, " for in order to be married they were obliged to have recourse to priests who had taken the oath, that is to say to schismatics." [1] It was not, however, until September, 1792, that the law was actually modified. Then, amid the scenes of confusion which accompanied the dissolution of the Legislative Assembly and the meeting of the Convention, two laws were hurriedly enacted which had an ultimate effect reaching far beyond the borders, however widely extended, of the French republic or empire.

The first established a civil ceremony of marriage to be performed under strict conditions by a public officer of the commune within which the parties, or one of them, should reside. The religious character of the contract was merely ignored ; a religious ceremony, a sacerdotal benediction, was neither expressly allowed nor forbidden. The legal validity of the marriage was to be determined exclusively by the civil ceremony.

The second introduced a still more novel practice of divorce, based in part on the Roman Law, in part on the Calvinistic doctrines of the school of Leyden. Canonical

[1] *Cambridge Modern History*, vol. viii., p. 736.

divorce *a mensa et toro* was forbidden, and there was substituted a complete dissolution of marriage, leaving the parties free to contract fresh alliances. This was to be decreed by a tribunal, either for certain specified causes or with the mutual consent of the parties. Among the causes were insanity, a sentence of crime involving infamy, notorious immorality, desertion for two years, and incompatibility of temper or character.

In this sinister fashion, and in the most sinister circumstances, the modern State first took entire and independent control of marriage. The Church was thrust aside with a contempt which soon passed into enmity. Yet the law of compulsory civil marriage for the moment afforded relief to the harassed Catholics. The Tridentine decree enabled them to regard the civil ceremony as of no effect in constituting a true marriage.[1] They were therefore set free to marry according to the rule of the Church in the presence of a priest who had not taken the constitutional oath, and could treat the visit to the communal officer as a mere registration of their marriage for legal purposes. The difficulties arising from the persecution which broke out in the following year, and from the prohibition of Christian worship under the Terror, were purely accidental. But the *Articles Organiques* appended by Napoleon to the Concordat of 1802 put a restraint on liberty. The civil ceremony remained compulsory, and it was forbidden under severe penalties to perform any religious ceremony of marriage until this had taken place. The intention was to enforce the Gallican theory and to compel the Church to accept the civil ceremony as the true contract of marriage, adding the nuptial benediction as the matter of the sacrament. This end was not achieved ; the Church held firmly by the Tri-

[1] See Boudinhon, *Canoniste Contemporain*, Sept., 1907, p. 540.

dentine rule, the civil ceremony was treated as a nullity, and the contract *in facie ecclesiae* which followed was regarded as alone effective.

These provisions, with others regulating the relations of the married, were incorporated into the Civil Code of 1804, the widespread influence of which brought them into the legislation of many countries. The requirement of a civil ceremony, and the prohibition of any religious ceremony preceding it, have been adopted in Belgium and the Netherlands, in Switzerland, Italy and Hungary, in the greater part of Germany, and in many of the Latin Republics of America. In Spain, in Austria, and in the Scandinavian Kingdoms, civil marriage is established for the benefit of those who refuse the services of the Church, but is not obligatory. In Roumania, by a combination of Eastern and Western ideas, there is appointed a civil form of espousal which must be followed, save in exceptional cases, by a sacerdotal benediction.

England once more calls for special remark in this connexion. The repeal of the Test Act in the year 1828 marks the definite separation of Church and State, but the change was carried out in the national fashion with little attention to logic or formula, and no attempt was made to reduce the new order of things to an intelligible system. In particular the administration of marriage was left for a time to the spiritual courts, without any clear delimitation of powers. The State, disentangled from ecclesiastical interests by means of a sharp struggle in which the hierarchy had obstinately resisted change, adopted an unreasonably arrogant tone, and treated the Church rather as an insubordinate servant than as a co-ordinate society. The Church, steeped in the tradition of Richard Hooker, resented the separation, desired no independence, and fought tenaciously for the remaining shreds of a privilege that was proper to a vanished

political order. Thus Dissenters, though now admitted to full political rights on equal terms, were not immediately relieved of their grievance in regard to the marriage laws, being still compelled to resort to the parish church for an unwelcome ceremony, and to the bishops' and archbishops' courts for the determination of matrimonial causes. After a period of active reform in other fields the former of these difficulties was taken in hand. In the year 1836 a new Marriage Act made a new and lop-sided arrangement; a system of civil registration was adopted; parties desiring to do so were allowed to contract marriage without any ceremony in the presence of a Superintendent Registrar, after a very inadequate publication of their intention, or even without such publication by licence of the registrar; the parochial clergy, at the same time, were required to keep duplicate registers of marriages solemnized in Church, one of which was eventually to be deposited with the Registrar General, and to send to the Superintendent Registrar of the district certified copies of the entries every three months. The clergy were thus made definitely ministers of the State for the purpose of marriage, and they were not relieved of the obligation, formerly imposed on them as the only qualified persons, of assisting at the marriage of any parties demanding their services, orthodox, heretic, or infidel. They were still distinguished by a privilege, partly onerous and partly honorific, from other ministers of religion; and this inequality was not redressed until the year 1898, when the minister of any regular place of worship certified to the Registrar General was permitted to solemnize marriages under similar conditions. In England, then, civil marriage and religious marriage exist side by side, with universal civil registration. No marriage is recognized as valid which is not contracted in one of these two ways.

Scotland retains intact its marriage law of the sixteenth

century, based on the teaching of Leyden. Ireland retains with very little alteration the Common Law, identified with that of England, according to which, as we have seen, the witness of a clerk in Holy Orders was requisite for a valid contract of marriage. This privilege is limited by an odious provision, belonging to the penal laws of the eighteenth century, by which the marriage of a Papist and a Protestant cannot be validly contracted in the presence of a Papist clergyman, and on the other hand it has been extended to ministers of all religious denominations. The rule of the common law, as finally determined by the House of Lords in the year 1844, has been applied to all English dominions over sea, in default of local legislation modifying it, as also to ships under the British flag; but common sense and necessity have compelled the judicial admission that, where a clergyman cannot be procured, a contract of marriage made in the presence of other witnesses will suffice.[1]

The revolutionary law of divorce has been less prolific than the law of civil marriage. Its way was prepared by the teaching and practice of Protestants, especially in the school of Leyden, by the study of Roman law, and by the general dissolution of morals in the eighteenth century. Its provisions were tempered in the Napoleonic Code, by which *séparation de corps* without dissolution of the bond was allowed expressly as a concession to Catholic feeling, and the grounds for divorce were reduced within narrower bounds, mutual consent being retained. The law was abrogated in the year 1816, and not revived until 1884, when the provision for mutual consent was omitted. But the influence of the Code was felt elsewhere, even while these sections were suppressed in France, and the idea of

[1] Halsbury, *The Laws of England*, vol. xvi., p. 307.

the dissolubility of marriage has made considerable headway in most countries.

I have shown abundantly that permission to marry after divorce is not necessarily based on this idea; it may be treated as a dispensation from the rigour of the natural law which forbids a second marriage during the lifetime of both parties to a valid union. But nowhere is it more plainly seen that dispensation, even grudgingly accorded, undermines the structure of law. English experience is well to the point. We have seen that such dispensations by Act of Parliament began from the later years of the seventeenth century. The promise that they should not be drawn to a standing precedent proved illusory, and what was at first an act of grace came to be regarded as a right, which might not be denied unless in exceptional circumstances. A regular procedure grew up, by which, at enormous expense, a man who had procured a canonical divorce on the ground of his wife's adultery could, almost as a matter of course, obtain legal permission to marry. Moreover, the act became one for the relaxation of the bond on both sides, so that the guilty wife was as free to marry as the injured husband, and public opinion not only allowed, but even encouraged, her union with the partner of her guilt, an union disallowed by laws that were framed, as in Scotland, under Calvinist influences. The merger of Church and State made acquiescence in these dispensations inevitable on the part of the hierarchy, the parties released were married without difficulty *in facie ecclesiae*, and the spiritual courts, which in accordance with the sacred canons had exacted of them a bond not to contract matrimony, accepted without demur their discharge from that obligation by authority of law. There was thus a recognized consequence of divorce which made mockery of the natural indissolubility of marriage.

But the procedure was open only to the wealthy, and this made it intolerably odious. It was based also on the canonical process, and in the course of the nineteenth century it was affected by a slowly growing consciousness of the incongruity of an arrangement which left to spiritual courts the juridical control of marriage in a State that was no longer identified with the Church. In giving sentence for bigamy on a labouring man a judge passed on this state of the law some remarks, caustic and unseemly, but entirely justified by the facts, which were widely reported and served to bring matters to a head. The result was seen in the Divorce Act of 1857. A new court of the Crown was established, to exercise the jurisdiction of the State in all matrimonial causes, with power to make five different decrees : a decree of nullity of marriage, a decree in the cause of jactitation of marriage, a decree for the restitution of conjugal rights on the petition of either party, a decree for separation *a mensa et toro*, and a decree of dissolution of marriage. The procedure and rules in respect of the first four were taken over in block from the practice of the ecclesiastical courts ; the last was a novelty. To the establishment of this court no exception could be taken by any one who acknowledges the right of the State to a jurisdiction in regard to marriage ; the adoption of the existing procedure was wise as a first step, but the general confusion of thought about the relations of Church and State caused the transaction to be regarded as a complete transfer of authority from the spiritual courts to the new tribunal, and the Church was thus left without any machinery at work for the administration of discipline.

The Divorce Act is commonly discussed as if it were the last word of legislation upon the subject. But that is far from being the case. Apart from an Act of Parliament giving Justices of the Peace the power to issue Separation

Orders which are effective divorces in the true sense of the word, and a Married Women's Property Act which has corrected an inequality of the Common Law by a greater inequality in the inverse sense and further weakened the community of married life, we have to reckon with the more subtle changes effected by custom and by jurisprudence. Two of these are of the greatest importance. In comparatively recent days a separation deed executed by husband and wife has come to be recognized at law, and its provisions will be enforced.[1] There is here a complete reversal of the older jurisprudence, prevailing in almost all systems of law, by which husband and wife were compelled on grounds of public policy to live together, failing a judicial divorce, in fulfilment of the social duties of marriage. The explanation is evident. There is lurking in the public mind a conception of marriage as a mere contractual relation between the parties, with which the State has no concern except for the purpose of seeing that they do no wrong to each other. The idea of marriage as a public institution, the foundation of social order, is disappearing from view. If we are to call things by their right names, we must recognize the effect of these deeds of separation, legally enforceable, as divorce by mutual consent freely allowed without judicial safeguards. But the relaxation of jurisprudence does not stop here. Of recent years, since the occurrence of a notable case of attempted abuse, there has been no enforcement of a decree for restitution of conjugal rights, and it is openly avowed that nothing of the kind will be allowed ; a decree is now sought only for the purpose of establishing legal desertion. Again calling things by their true names, we must describe this as judicial permission of divorce at the will of either party. Husband

[1] Halsbury, *The Laws of England*, vol. xvi., p. 439.

or wife is definitely allowed to repudiate the duties of marriage, and to withdraw from the common life. The English law of marriage and divorce has thus become perhaps the most lax in the world. The importance of this, in view of the growing demand for freedom to marry after any kind of legal separation, can hardly be exaggerated.

The legislation of the State has naturally touched impediments. The distinction of obstructive and diriment has been generally done away, a marriage being in some cases rendered void by the neglect even of a trifling formality. Impediments purely civil are encountered in France as early as the seventeenth century, and their effect was recognized by the Church ; a certificate of publication of banns stated that no such impediment was alleged.[1] In England the effective separation of Church and State was soon followed by fresh legislation concerning consanguinity and affinity, which took up the sorry tale of the sixteenth century. Lord Lyndhurst revived the traditions of Henry VIII and solved some difficulties of a ducal house by procuring in 1835 the statutory adoption of the whole of Parker's Table, with the provision that the forbidden unions should be not merely void in the canonical sense, or voidable by course of law, but simply non-existent or void without process. In 1907 a logically consistent scheme was shattered, in consequence of the agitation of some wealthy people, by the excision of one detail, and marriage with a wife's sister was made in most cases legally valid. As explained above, ecclesiastical dispensations are, with little consistency, retained for the removal of certain impediments within the ambit of civil law.

Surveying the present position as a whole, we see every-

[1] *Rituel du Diocèse d'Alet*, 5th ed., p. 555. " Il ne s'est découvert aucun empeschement, ou canonique ou civil, qui empesche qu'on ne puisse proceder à la celebration de leur mariage."

where a divergence of Church and State in respect of the law of marriage, which not unfrequently begets direct antagonism. I have shown that conflict is not inevitable where two different systems of human law are applicable to the same persons. Adjustment is possible ; even where no care is taken to avoid collision, it may happen that obedience to one law will not hinder the observance of the other. A striking example of adjustment is seen in the case of the compulsory civil marriage of France and Italy. The adoption of the Tridentine rule in these countries enables the Church to disregard the civil ceremony as an empty formality, and the parties are free to fulfil canonical obligations by contracting marriage *in facie ecclesiae*. Without this rule it is evident that the civil marriage would be counted valid by the law of nature, and canonical marriage would be made impossible. The corresponding position in England is more complicated. It may be taken for a general truth that when Church and State fell apart from the unitary community in which they were merged, each was equipped with the whole marriage law which they had previously had in common. So the English State took over the Canon Law as actually in force, and subsequent legislation has but modified its provisions. Equally the English Church must have taken over the marriage law of the country as it existed in the year 1828. But by this law no marriage was counted ordinarily valid unless contracted with all the formalities of the ecclesiastical ceremony. The English Church thus had a law identical with that of the Eastern Church. Is, then, the civil form of contract introduced in 1836 to be reckoned invalid for the purposes of ecclesiastical discipline? At first this would seem inevitably to follow, and such marriages were commonly reckoned void by the clergy, the parties being urged to regulate their union by a ceremony *in facie ecclesiae*. But the

clergy were officers of the State for the purpose of registration, and the entry of such marriages in their registers brought them into serious conflict with the law, and in one case, at least, into imminent danger of severe punishment. It was at length settled, with legislative sanction, that they might perform the ecclesiastical ceremony on condition that nothing was said or done, as by registration, to impugn the legal validity of the contract made before the registrar. In the meantime the spiritual courts, hampered by the legal jurisdiction still vested in them, either willingly or of constraint accepted the civil contract as sufficient. The situation was confused, but opposition to the new form of marriage insensibly diminished, the superior authorities of the Church discouraging it, and it may be said with confidence that by the operation of canonical custom the law which made it void has now gone into desuetude.

But the effect of this desuetude must be considered. It amounts to the abrogation, for ecclesiastical purposes, of the Marriage Acts of 1753 and 1823. In so far as they are marriage-officers of the State, the clergy are strictly bound by the later of those Acts, but I am now concerned with their purely spiritual function and their dealings with individual members of the Church. In this respect the Acts are obsolete. It is not that they are amended by the Marriage Act of 1836, for this cannot be construed as a legislative act of the Church; it is not that one other form of marriage, authorized by the State, is accepted as ecclesiastically valid. By the canonical abrogation of the Marriage Acts the Church is thrown back on the natural law prevailing before they were adopted. It follows that a marriage contracted before a Superintendent Registrar is valid, not because of the legal formalities observed, but because it is a contract *per verba de praesenti* in accordance with the Law of Nature. Equally will every other marriage so con-

tracted be valid for spiritual purposes. If this conclusion is sound, and I can see no escape from it, the Church may be obliged to recognize as valid, and binding on the consciences of the parties, a clandestine marriage which the State will regard as void. It will have no legal effect, but will be *matrimonium conscientiae*. In such cases it will be the duty of the Church, in accordance with canonical practice, to call upon the parties, failing dispensation, to renew their contract *in facie ecclesiae*. A conflict of laws would thus be averted; but cases may remain, as when a person morally bound by such a contract has formed another alliance with public formalities, which will involve a serious antagonism between the rules of the Church and the laws of the State.

More obvious are the possibilities of discord arising out of divergent rules about impediments. I have endeavoured to show that the right of the State to create impediments cannot be impugned, and that such impediments should be respected by the Church. We have seen the French Church so acting in the seventeenth century. If there were reciprocal action on the part of the State, if members of the Church were not allowed to contract a legal marriage contrary to the rules of the Church, there would be no conflict. But there seems to be no prospect of such agreement. It follows that legal marriages will be contracted which the Church cannot regard as valid for spiritual purposes. The difficulty is acute in England at the present moment in regard to marriage with a deceased wife's sister. The legal effect of such a marriage, and the legal obligations ensuing, are indisputable; it would seem to be improper for the Church to encourage either of the parties to repudiate or evade those obligations, but at the same time it seems absolutely necessary to urge as a religious duty a *separatio corporum*. As row administered, the law recognizes this if

carried out by mutual consent, and tolerates it when effected by either party, so that active collision between Church and State need not be feared. A graver trouble comes of the persistent refusal of many Englishmen to recognize the real separation of Church and State, and the existence of a rule of the Church divergent from the law of the State. The ecclesiastical celebration of any marriage allowed by law is imperiously demanded, and the right of the Church to censure its members who contract a forbidden union is openly impugned.

Graver still, and more frequent, are the possibilities of conflict arising from the practice of divorce. I have shown that divorce may best be considered in the category of dispensation, as a permission to withdraw from the chief obligations of the married state, and that permission to marry after divorce, whether described as dissolution of marriage or not, may usually be reduced to a further dispensation, removing an impediment. The former kind of dispensation seems to be certainly within the province of the State ; the latter may be doubtfully allowed. But the Church also has rules for its own members ; the grounds for a divorce authorized by the State may be such as the Church cannot approve, and a dispensation for remarriage may be without exception reprobated. That is the case alike in France and in England, the two countries where contention is sharpest. I will not speak of the United States, where ecclesiastical confusion may compel a sectarian treatment of the question. The trouble is not great where divorce only is concerned, though the Church may sometimes be bound to rebuke and censure those who separate themselves in course of law. Remarriage, and the assertion of a total dissolution of the bond, is the difficulty. It is double ; the Church condemns two things which the law allows, must censure any one of its members who seeks a decree of dissolution, and censure yet

more severely one who proceeds to a new marriage ; in this case also, when the wrong has been done, *separatio corporum* must be made a condition of absolution. In this case also an insistent demand for the connivance of the Church must encounter stern refusal. Conflict is inevitable, and any extension of the practice of divorce will widen the field.

Yet it may be curiously observed that an extreme extension might on the contrary lessen the difficulties of the Church. There is a demand for a law of divorce allowing the dissolution of marriage, "either by mutual consent or at the finally expressed will of either party."[1] That would be, in effect, a return to the last state of Roman or Jewish law, and it is not impossible. Should such a law be adopted, there would arise a grave question whether unions contracted in accordance with its provisions could be regarded as true marriages at all, for an agreement of man and woman to live together during pleasure is not a contract of marriage. To be precise, it is a contract of concubinage.[2] The contract may be recognized by law, its terms may be enforced by law, the position of children born of such an union may be secured by law, but it is doubtful whether any legal regulation can make the relation of the parties true marriage. If the laws of a State be taken as a connected scheme, and if in that scheme what is called marriage be treated as a mere partnership dissoluble by mutual consent or at the will of either party, it may seem that a contract made in form of law will be governed by the implications of the law, and will have no effect beyond what the law contemplates. Civil

[1] Kitchin, *A History of Divorce*, p. 270.

[2] One can hardly concur with the judgment of Pothier, *op. cit.*, tom. i., p. 7, that Roman concubinage was a species of true marriage. "L'autre espèce de mariage," he says, "qu'on appelloit *concubinatus*, étoit aussi un veritable mariage."

marriage will then be no real marriage, but legal concubinage; either party will be free, in conscience as in law, to break off the connexion. The task of the Church will then be simplified; real marriage will be a thing of which the State has no cognizance, and its regulation will fall exclusively into the hands of the Church and of kindred societies. It is true that, even under such conditions, the parties themselves might contract true marriage in the form of the civil procedure, but the validity of the marriage and the consequent moral obligations would depend on their personal intention, not on the legal formalities; if they understood the contract to be one of true marriage, and intended a life-long union, they would certainly be married according to the Law of Nature; but this fact would have to be ascertained by particular evidence, as in the case of a clandestine marriage. I do not pretend to solve so knotty a problem, leaving it to the judgment of the Church in case the need should arise. A doubt of this kind may possibly account for those hesitations of St. Augustine about the binding effect of Roman marriage to which I have called attention.

The task of the Church might be simplified, as I have said, in this way; but no good Christian would wish to find relief from present difficulties in the disappearance of the divinely natural institution of marriage from the laws of his country. A wider divergence of Church and State might diminish friction, but it would aggravate the moral evil caused by all such divergence. This must not be lightly estimated. Legality and morality can be clearly distinguished by a political philosopher, but by the common sort of people they are pretty sure to be confused. Manners are formed or modified by legal pressure and legal laxity; a conflict between the authority which appeals to conscience and the authority which directs the strong arm of law will always be injurious

to morals. Peace must therefore be sought without sacrifice of truth.

To seek peace, we should know the causes of conflict. Why are Church and State antagonistic in regard to marriage? In so far as they pursue a different object, they cannot be brought together; but I have shown that even so they can for the most part move in different planes, avoiding collision. It is the temper of antagonism which works most mischief. Why this temper? It is rooted in history. The separation of Church and State has not been altogether amicable. In regard to marriage there has been a rivalry, each endeavouring to secure the inheritance of its legal control from the common society out of which both have emerged. The Church has parted reluctantly with a charge that was felt to be too sacred for any other guardian. The State has an abiding suspicion, not altogether unfounded, that the Church will intrigue for the recovery of a lost province. I have been drawn here to the use of abstractions and personifications which must be employed with caution, but they stand for genuine facts of modern life. Men who direct affairs of State, lawyers above all, occupy this outlook; ministers of the Church, and theologians in particular, have this weakness. Nay, one man himself will be swayed this way and that as he exercises alternately, in high or low degree, the functions of Statesman and of Churchman. On both sides there is jealousy; the more acute where the severance has been less openly avowed, as in England, and less logically complete. While the Church even seems to be desirous of dictating laws to the State, and while the State resents the independent action of the Church, there will be continual strife and confusion of simple minds.

A *modus vivendi* must be sought. The State is not likely to move first, nor is it unseemly for the Christian Church to take the lead in a search after peace. The first thing neces-

sary seems to be a clear delimitation of functions. Precedents are not lacking. For many centuries the hierarchy had exclusive control of marriage. The results were not happy. Values were confused, as always in theocratic government. But for a still longer period the hierarchy had exercised a limited control of a more purely spiritual kind. For the first ten Christian centuries the Church was gradually drawing to itself the power which it eventually grasped, but this was built on a foundation of another kind, which survives the ruin of the superstructure. The permanent element is the exercise of spiritual discipline, directing by appeals to the conscience or by open censure the conduct of the faithful. This was overlaid, and almost extinguished, by the secular business accruing to the ecclesiastical courts in the Middle Ages. Discharged from the care of that business, the Church may resume its proper functions. They may be more carefully guarded than in earlier times, for mistakes are recorded in history, and the false moves which once led insensibly to embarrassing engagements can be avoided. If it is made plain that the Church intends nothing but the direction of conscience, a chief cause of jealousy and misunderstanding will be removed.

This does not mean that the Church will act only *in foro conscientiae*. Marriage is too public a thing to be referred thither in all cases alike. It belongs to the social order of mankind, and the Church is the social order of mankind raised to a supernatural power. The validity of the contract, the obligations ensuing thereon, the duties of the married state, the relations of husband and wife, are matters of public notoriety, in regard to religion as well as in regard to civil order. The Church has need of an external *forum*, in which matters of this kind may be publicly determined. The proceedings should be in reality, as once in form, *pro salute animae*. The Church has no longer to determine legal

consequences, to assert legal rights, or to redress wrong by legal remedies; but the unwary are still to be admonished, and the recalcitrant are still to be censured, that they may learn not to offend. Justice requires that discipline of this open kind should be administered with those safeguards which are secured by judicial process. If the Church was overloaded with legalism in the Middle Ages, it is possible to go too far in the opposite direction.

There is a crying need of a suitable *forum* for matrimonial causes in the Church of England. I use a legal term, lest I should seem to be evading a difficulty, but the questions in view are not legal, and it would probably be wise to make a sparing use of legal language in dealing with them. For this reason, and for others, the existing ecclesiastical courts are unsuited for the task. Their traditions, their language, their forms, are legal. They are relics of the medieval polity that has passed away. Because they belonged to that polity they were brought, rightly or wrongly, into subjection to the Crown, and exposed to the control of the temporal courts. A limited control of this kind, like the French *appel comme d'abus*, is neither objectionable nor avoidable, for the State is the natural guardian of justice; but a control like that exercised in England, or under the *Coûtume de Paris* which still runs in a part of Canada, reduces spiritual discipline to a mere department of law. It survives, an intolerable anachronism, to deprive ecclesiastical courts of their most important characteristic. It would be futile to rely upon tribunals so bound by the laws of the State for the administration of a discipline, the essential quality of which is to be independent of those laws. What seems to be required is the organization by episcopal authority of a penitential jurisdiction which may deal openly with questions of marriage, divorce, and other elements of public morality.[1]

[1] For instances of an Archbishop dealing with such matters "*plane*

Such jurisdiction would need no sanction but that of the sacred mission of the Church, and no support but that of the Christian conscience. The law of the State would pass it by, because moving in a different plane.

That some such solution will be found, I cannot doubt. It is being reached in countries where the historic causes of jealousy between Church and State are least operative. It is being brought on by force of circumstances even where it is least sought. In this connexion the recent legislation of the Roman Church is of great importance.

The constitution of the Council of Trent nullifying clandestine marriages was made as for united Christendom, but from the first there were two causes hindering its universality. On the one hand, the new rule was to have effect, by order of the Council itself, only in places where it was expressly promulgated, and in many places this was not done. On the other hand, the disruptive forces of the Reformation withdrew a large part of Christendom from any pretence of submission to the Council. The two causes worked together, for the disruption was the main ground, though not the only ground, for abstaining from promulgation. Many difficulties ensued, of which three are specially noteworthy. (1) Questions arose about the validity of marriage contracted between a person subject to the new rule and one residing in a place where it was not promulgated, and unexpected nullities were the result. This trouble was acute in Germany, where contiguous parishes were not unfrequently under different laws. (2) In places where the rule was promulgated, it was held binding, according to canonical precedent, on all the baptized, heretics and schismatics included. But in some of these places, as at Malta, canonical marriage

et summarie without the tedious formalities of the law," *see* Strype's *Parker*, pp. 144, 280.

was until recently the only kind of marriage recognized by law. Consequently the presence of the parish priest was required for the legal marriage even of heretics and schismatics. (3) The great disruption, and the ultimately inevitable toleration of heresy and schism, brought in the impediment of mixed religion. This must not be confused with *disparitas cultus*; heresy was never made in the West, as in the Eastern Church, a diriment impediment; it has been treated only as obstructive, and there grew up in the nineteenth century a very confused practice in regard to dispensations and the conditions on which they might be granted. These difficulties were increased by the mobility of populations in recent times, and after long debate the authorities at Rome revised the Tridentine rule to suit modern circumstances. This was done by the decree *Ne temere*, of August, 1907. Subsequent decrees of the Holy See have cleared away some doubts or obscurities, and the new rule is now fairly clear.[1]

Neglecting many details, I note three things of special interest: (1) The assistance of the parish priest is more strictly defined; his merely accidental presence as witness of the contract will not suffice; he must be called in, at least implicitly, and asked to render his services; he must himself demand and receive the consent of the parties; the marriage will be invalid if he is put to constraint. (2) In immediate peril of death, if the assistance of the priest cannot be obtained, and in regions where for a month or more his presence is impossible, the parties may lawfully and validly contract marriage in the presence of two witnesses. (3) The rule extends to all persons "baptized in the Catholic Church, or converted to it from heresy or schism," provided they be

[1] For the text see App. A. For a full commentary see Boudinhon, *Canoniste Contemporain*, 1907–8.

of the Latin rite. It does not apply to Catholics of any Eastern rite, nor to any who are " acatholici," whether baptized or not. Where one party is Catholic and the other is not, it holds good in spite of any dispensation, unless it be otherwise provided by the Holy See for any particular place or region.

Under the last provision the German Empire seems to be exempt, but, so far as I am aware, no other place or region. The operative parts of the decree which bear on the point now under consideration may be rapidly estimated. The first has the effect of strengthening the position of the parish priest, and therefore extends the impression, already produced by the Tridentine rule, that the state of marriage is created by the intervention of an official. The second, on the other hand, testifies in principle to the validity of a marriage contracted according to natural law without such intervention. The third is far more important, and demands careful scrutiny.

The Tridentine rule, as I have said, was by intention universal, applying to all Christians, and that in a society which did not tolerate, except sporadically on behalf of Jews, any diversity of religion. The power thus to legislate was jealously asserted by the Roman Church, and recognition was for a long time reluctantly accorded even to patent facts in conflict with the claim. Even now the conservative instinct of the Court of Rome forbids any change of language, and the decree *Ne temere* is conceived in terms implying that the legal effect of marriage and the legitimation of offspring depend upon its provisions. But in its final clause instant facts are at last recognized. Exemptions from the Tridentine rule were merely territorial; where promulgated, it was meant for all Christians alike. In the case of *Ne temere* also there are territorial exemptions, but more broadly the decree is confined in express terms to those who have

voluntarily submitted themselves to the spiritual rule of the Roman pontiff. It does not extend to those who in the language of the Curia are termed "acatholici." That is to say, the Church of Rome withdraws the claim to control the marriage law of Christendom at large, and contents itself with the disciplinary control of those who submit.

It is true that the withdrawal is not definitely asserted. So far as the words of the decree go, the larger claim may be reserved. Indeed, the withdrawal is limited by a refusal to recognize the right of any one to renounce an allegiance once professed. But this must be expected. The Court of Rome, with its vast machinery of intricate tradition, moves slowly even in the recognition of obvious facts. It is much that it moves at all. What I have to note is the direction in which it is moving.

I have this also to note. There is now, I believe, no country in which the canons of the Roman Church regarding marriage have exclusive legal effect; but there are some countries, notably the Russian Empire, the Austrian dominions, Spain, and the island of Malta, in which they more or less completely bind individual persons publicly adhering to the Roman communion. Yet even here it is allowed that such legal effect is consequent upon positive laws of the country, may be varied by the legislature and must be interpreted by the judicature of the State. At most the national government is bound by a diplomatic instrument, a concordat with the Holy See, which may be denounced and cancelled. Nowhere does the medieval conception of the legal control of marriage by the hierarchy survive. The Court of Rome accepts this state of things in fact, if not in theory, and the decree *Ne temere* is an adjustment of canonical practice to existing facts. It is addressed to all adherents of the Roman communion as such, whatever be the civil laws under which they live, and it appeals exclusively to their

consciences. It has no legal effect, unless accidentally, and it is not held back on that account. In reality, if not avowedly, the Roman Church falls back upon a position of purely spiritual discipline.

This may pave the way for a great reform. The confusion now existing in the laws of diverse States regarding marriage and divorce cannot but be regarded as a great evil.[1] Not only do States entirely independent go their own way, but even within the great federal communities of the United States, of Canada, and of Australia, the component parts have laws differing in various degrees. The jurisprudence of different countries follows different rules in applying the principle of domicile or of international comity, with the consequence that a marriage held valid in one country is elsewhere annulled, and the married in passing from one place of residence to another may find themselves for all legal purposes disunited. This state of things is inevitable, so long as States jealously assert their right severally and entirely to control the law of marriage in regard to their subjects and denizens. But marriage is not a matter merely of national or local institution. It is the foundation of human society ; the great development of nationalities during the last three centuries has not destroyed the real unity of mankind, nor entirely obliterated all sense of it, and the extensive movement of individuals and families which characterizes modern life makes the recognition of that unity more important. International commerce compels a certain unification of method in all civilized communities ; international intercourse of life renders a similar unification of the law of the family at least equally desirable. It can be effected

[1] Their diversity and complexity may be studied in Renton and Phillimore's *Comparative Law of Marriage and Divorce*, my deep indebtedness to which I will here once for all acknowledge.

only by international agreement. Marriage should be a subject of International Law, and the evil wrought by the shattering of the unity of Canon Law may thus be remedied. A very small beginning has been made by The Hague Conference in determining how far the *lex loci* and the national law of the parties shall respectively apply to cases of divorce; in the same kind of procedure lies the main hope of a larger unity.

If unity is to be achieved, its roots must be sought in the Natural Law. English lawyers are impatient of this, and even French jurists, wrapt in the study of their finished Code, pay it comparatively small attention; but international jurists are compelled to build upon it as their only foundation. It is therefore necessary to insist on the essential character of marriage as founded in the order of nature. Unity can be attained only by the abandonment of what is merely artificial, by the limitation of restrictions and requirements which represent a peculiar tradition, by a return to the broad principles underlying narrow provincialisms.

This does not mean that all local or national laws will be superseded. Such an achievement, even if it be desirable, is beyond the widest range of possibility. It does mean that there shall be the least possible interference, whether by addition or by dispensation, with the Law of Nature. It means, above all, the reduction of diriment impediments within the narrowest bounds, the abandonment of rules requiring for the validity of a marriage the intervention of an official or the fulfilment of onerous precautions. It is idle to suppose that these can be made even approximately identical in all countries, and they are the chief cause of the existing confusion. Their disappearance need not hinder the enforcement of stringent laws imposing penalties on those who contract marriage without regarding the rules

of publicity established by law; it will only intercept the wrong that is not unfrequently done where a contract made in good faith, and fulfilled in person, is found to be legally void for lack of some formality. The abandonment of false positions should not be impossible; the detailed marriage laws of most modern states are not conspicuously wise. If jealousy of ecclesiastical dictation is diminished, the jealous defence of national rules may give way. Nor is there lacking an example of what is needed. The marriage law of Scotland, in its august and austere simplicity, affords a model. But for the Calvinistic teaching that adultery or malicious desertion *ipso facto* dissolves the bond, it involves little or no disturbance of the natural order, and adds the smallest amount of matter required for public discipline. I speak of Scottish law because it is fairly well known to Englishmen, but it is not merely Scottish; it is directly derived from the Roman-Dutch law as taught in the school of Leyden. That school has bred also the greatest of international jurists. If a Conference at The Hague is to give the civilized world the benefit of an unified law of marriage, the proximity of Leyden may be the best of omens.

But this is a vision of many days. In the meantime there are local reforms to be effected, and here we must ask what is the duty of the instructed Christian. He is obviously bound to direct his own personal conduct by the Christian rule. In the absence of any public *forum* effectively controlling marriage by penitential discipline, he is the more bound to a proper regard for the *forum conscientiae*. The laxity of the English law, and the almost unlimited facilities which it affords for evasions of the obligations of the married state, give to this moral discipline a paramount importance. But the duty of a Christian is not fulfilled with the regulation of his own conduct. He is a member of two public communities, Church and State, in regard to both of which he

has public obligations. They must be considered separately, and in their interaction.

It is the duty of a Christian to support the authority of the Church. It may be his duty also to lend his aid for the reform of abuses in the Church. In the present condition of latent or open antagonism between Church and State, it is his duty to labour for a just settlement; in England there is urgent need of a wise and courageous defence of the right of the Church to exercise discipline over its members in cases where the civil law of marriage conflicts with the sacred canons. That right is challenged, and the challenge has the support of weighty precedents. The hierarchy must assert and exercise the power of excluding from communion those who under cover of law resist the ordinance of God or the rule of the Church. "This principle," the Archbishop of York has lately said, "is inherent in any claim of the Church to be a spiritual society, and is in no way inconsistent with the true understanding of its constitutional relations with the State."[1] But the hierarchy needs the constant support of the faithful. The power must be exercised at any cost; the cost will be less, the difficulty will be reduced, in proportion as the faithful generally bring their neighbours to acknowledge its reasonableness. "There seems to me," says the Bishop of Oxford, "to be no principle more certain than the principle that this judicial power belongs to the Church only, and that the Church cannot surrender its authority to the State without fundamental treason. I believe, therefore, that it is our duty to abide by this principle and to face the consequences —without violent language or intemperate action, but solemnly and with due sense of the gravity of the issue. And we ought to pray with all our hearts that our bishops, clergy, and laity may be given in this matter the virtue of

[1] *Pastoral Letter* of July, 1912.

courage and simplicity and the wisdom to commend the principle of our action to the common religious conscience of the nation." [1]

To commend a principle to the common sense of mankind is to apply it wisely, with open sincerity, and with evident justice. So to apply this principle is not impossible. In asserting the rights of the Church, it is not necessary to decry the rights of the State. I have laboured to show that the State has inherent rights in the matter of marriage and divorce. It would be well if the laws of the Church and of the State should coincide, but it is not necessary. The rule of the Church will be most wisely defended when the rule of the State is treated with respect. When the State allows things plainly repugnant to natural morality, there must be plain speaking. But when the State allows things which the Church forbids, or which the Church teaches on the ground of revelation to be contrary to the Divine Law, there is no place for intemperate or contemptuous words. Not all the subjects of the State are subjects of the Church, and the State legislates for all its subjects alike. The Church may forbid its own members to use a liberty which the State allows, or even to do what the State commands, but it is not reasonable to object to the liberty or the command merely on the ground of its disagreement with a rule of the Church. If the State allows a marriage which the Church disallows on the score of kinship, it is perfectly just to call that marriage incestuous in the course of ecclesiastical discipline, to warn the faithful against contracting it, and to censure those who disobey; but it is not just to treat it as of no account at all, and to speak of the married as living in mere fornication. "There is a marked distinction," says the Archbishop of Canterbury,

[1] *Pastoral Letter* of July, 1912.

" between the case of a man who has conscientiously contracted a marriage ecclesiastically irregular but expressly legalized and validated, and the case of a man who is living with a woman not legally his wife, is producing illegitimate children, and is capable during his partner's lifetime of forthwith marrying another woman." Account should be taken of legality; and, doing this honestly, the Church will stand on firmer ground in asserting that something more than legality must be considered where it is a question of spiritual discipline. " The contention that it rests with Parliament," says the Archbishop again, " or with the civil courts, and not with the Church itself, which has authorities and courts for the purpose, to determine the conditions of the admission of our members to Holy Communion, is untenable, and if it were to be authoritatively asserted, acquiescence in it would be impossible." [1]

It is the duty of a Christian to support the authority of the State. It may be his duty also to labour for the reformation of the laws of the State. In doing this he has no right to put aside what he has learnt as a Christian, and in the quality of citizenship to act as a mere natural man. Such a division of personality is intolerable. But neither is he bound to insist that the laws of the State, in regard to marriage or in regard to anything else, shall conform exactly to Christian teaching. Not all the subjects of the State are Christian, and the State must legislate for all. He is bound, however, to use his Christian illumination for ascertaining what is naturally just, and he is no less bound to ensue peace by endeavouring to bring the law into such a frame that it will not actually conflict with his obligations to the Church.

[1] *Letter to the Bishop of London.* The text of this important document is given below in Appendix B.

The present state of the English law of marriage affords ample scope for such endeavour. Apart from the misuse of divorce and the peril of interference with spiritual discipline, about which I have said enough, four conspicuous defects are apparent. There is evil in the law which annuls a marriage contract by reason of the neglect of arbitrarily imposed formalities; this law, enacted for the repression of clandestinity, recognizes three different methods of contracting which provide the most inadequate safeguards for publicity; the requirement of the intervention of an official person, who appears to be actually joining the parties, engenders a false opinion about the nature of the contract; the confusion of functions, ecclesiastical and civil, in the solemnization of marriage hinders a clear recognition of the respective rights and powers of Church and State.

The first of these four defects of the law requires separate treatment; reform means the abandonment of a principle incorporated into legislation within the last hundred and sixty years, and the assimilation of English law to the laws of Scotland and Ireland. The other three faults can be remedied by a single reform. The State should insist on adequate publicity of marriage, by requiring previous notification of an effective kind, and by imposing severe penalties on all persons concerned in a contract of marriage made without such notification; simplicity and efficiency demand the commission of these preliminaries, and of subsequent registration, uniformly in all cases alike to a public official, but his intervention at the actual making of the contract is neither necessary, convenient, nor desirable, all that is needed being a record of sufficient witness to what is done. An amendment of the law conceived in this fashion would provide for that publicity and uniform registration which it is the proper function of the State to guard, would leave the parties free to contract *in facie ecclesiae* or

otherwise according to their judgment, and would enable the Church to solemnize their nuptials with such rites, such publicity, and such record as the sacred canons require. It would secure perfect religious equality, and would emphasize, instead of obscuring, the natural relation which human law can but observe and regulate.[1]

The graver questions of divorce remain. The necessity of a legal system of divorce cannot, I think, be denied. That its control falls properly within the dispensing power of the State I have tried to prove. Its abuse may be restrained by a healthy public opinion, to the formation of which every Christian is plainly bound to contribute what lies in his power; but he is not bound to insist that the State shall be restricted to those grounds for separation which the Church considers adequate. It is hardly possible to hope for exact agreement, either here or in the recognition of impediments to marriage, since the State legislates for all men, and the Church for Christians alone. The candid acknowledgment of diversity makes for that mutual toleration which will secure for the Church freedom in the exercise of spiritual discipline.

[1] For a scheme of reform in detail, see Appendix C.

Appendix A

1. THE DECREE *NE TEMERE*

Ne temere inirentur clandestina conjugia, quae Dei Ecclesia justissimis de causis semper detestata est atque prohibuit, provide cavit Tridentinum Concilium, *cap.* 1, *Sess. XXIV de reform. matrim.* edicens: "Qui aliter quam praesente parocho vel alio sacerdote de ipsius parochi seu Ordinarii licentia et duobus vel tribus testibus matrimonium contrahere attentabunt, eos Sancta Synodus ad sic contrahendum omnino inhabiles reddit, et hujusmodi contractus irritos et nullos esse decernit."

Sed cum idem Sacrum Concilium praecepisset, ut tale decretum publicaretur in singulis paroeciis, nec vim haberet nisi iis in locis ubi esset promulgatum; accidit ut plura loca, in quibus publicatio illa facta non fuit, beneficio tridentinae legis caruerint, hodieque careant, et haesitationibus atque incommodis veteris disciplinae adhuc obnoxia maneant.

Verum nec ubi viguit nova lex, sublata est omnis difficultas. Saepe namque gravis exstitit dubitatio in decernenda persona parochi, quo praesente matrimonium sit contrahendum: Statuit quidem canonica disciplina, proprium parochum eum intelligi debere, cujus in paroecia domicilium sit, aut quasi-domicilium alterutrius contrahentis. Verum quia nonnunquam difficile est judicare, certone constet de quasi-domicilio, haud pauca matrimonia fuerunt objecta periculo ne nulla essent: multa quoque, sive inscitia hominum sive fraude, illegitima prorsus atque irrita deprehensa sunt.

Haec dudum deplorata, eo crebrius accidere nostra aetate videmus, quo facilius ac celerius commeatus cum gentibus, etiam disjunctissimis, perficiuntur. Quamobrem sapientibus viris ac doctissimis visum est expedire ut mutatio aliqua induceretur in jure circa formam celebrandi connubii. Complures etiam sacrorum Antistites omni ex parte terrarum, praesertim e celebrioribus civitatibus, ubi gravior appareret necessitas, supplices ad id preces Apostolicae Sedi admoverunt.

Flagitatum simul est ab Episcopis, tum Europae plerisque, tum aliarum regionum, ut incommodis occurreretur, quae ex sponsalibus, idest mutuis promissionibus futuri matrimonii privatim initis,

derivantur. Docuit enim experientia satis, quae secum pericula ferant ejusmodi sponsalia: primum quidem incitamenta peccandi causamque cur inexpertae puellae decipiantur; postea dissidia ac lites inextricabiles.

His rerum adjunctis permotus SS^mus D.N. Pius PP.X, pro ea quam gerit omnium Ecclesiarum sollicitudine, cupiens ad memorata damna et pericula removenda temperatione aliqua uti, commisit S. Congregationi Concilii ut de hac re videret, et quae opportuna aestimaret, S. Sedi proponeret.

Voluit etiam votum audire Consilii ad jus canonicum in unum redigendum constituti, nec non E^morum Cardinalium qui pro eodem codice parando speciali commissione delecti sunt: a quibus, quemadmodum et a S. Congregatione Concilii, conventus in eum finem saepius habiti sunt. Omnium autem sententiis obtentis, SS^mus Dominus S. Congregationi Concilii mandavit, ut decretum ederet quo leges, a Se ex certa scientia et matura deliberatione probatae, continerentur, quibus sponsalium et matrimonii disciplina in posterum regeretur, eorumque celebratio expedita, certa atque ordinata fieret.

In executionem itaque Apostolici mandati, S. Concilii Congregatio praesentibus litteris constituit atque decernit ea quae sequuntur.

De Sponsalibus

I. Ea tantum sponsalia habentur valida et canonicos sortiuntur effectus, quae contracta fuerint per scripturam subsignatam a partibus et vel a parocho, aut a loci Ordinario, vel saltem a duobus testibus.

Quod si utraque vel alterutra pars scribere nesciat, id in ipsa scriptura adnotetur; et alius testis addatur, qui cum parocho, aut loci Ordinario, vel duobus testibus, de quibus supra, scripturam subsignet.

II. Nomine parochi hic et in sequentibus articulis venit non solum qui legitime praeest paroeciae canonice erectae; sed in regionibus, ubi paroeciae canonice erectae non sunt, etiam sacerdos cui in aliquo definito territorio cura animarum legitime commissa est, et parocho aequiparatur; et in missionibus, ubi territoria necdum perfecte divisa sunt, omnis sacerdos a missionis Moderatore ad animarum curam in aliqua statione universaliter deputatus.

De Matrimonio

III. Ea tantum matrimonia valida sunt, quae contrahuntur coram parocho vel loci Ordinario vel sacerdote ab alterutro delegato, et duobus saltem testibus, juxta tamen regulas in sequentibus arti-

culis expressas, et salvis exceptionibus quae infra n. VII et VIII ponuntur.

IV. Parochus et loci Ordinarius *valide* matrimonio adsistunt,

§ 1° a die tantummodo adeptae possessionis beneficii vel initi officii, nisi publico decreto nominatim fuerint excommunicati vel ab officio suspensi;

§ 2° intra limites dumtaxat sui territorii: in quo matrimoniis nedum suorum subditorum, sed etiam non subditorum valide adsistunt;

§ 3° dummodo invitati ac rogati, et neque vi neque metu gravi constricti requirant excipiantque contrahentium consensum.

V. *Licite* autem adsistunt,

§ 1° constito sibi legitime de libero statu contrahentium, servatis de jure servandis;

§ 2° constito insuper de domicilio, vel saltem de menstrua commoratione alterutrius contrahentis in loco matrimonii;

§ 3° quod si deficiat, ut parochus et loci Ordinarius licite matrimonio adsint, indigent licentia parochi vel Ordinarii proprii alterutrius contrahentis, nisi gravis intercedat necessitas, quae ab ea excuset.

§ 4° Quoad *vagos*, extra casum necessitatis, parocho ne liceat eorum matrimoniis adsistere, nisi, re ad Ordinarium vel ad sacerdotem ab eo delegatum delata, licentiam adsistendi impetraverit.

§ 5° In quolibet autem casu pro regula habeatur ut matrimonium coram sponsae parocho celebretur, nisi aliqua justa causa excuset.

VI. Parochus et loci Ordinarius licentiam concedere possunt alii sacerdoti determinato ac certo, ut matrimoniis intra limites sui territorii adsistat.

Delegatus autem, ut valide et licite adsistat, servare tenetur limites mandati, et regulas pro parocho et loci Ordinario n. IV et V superius statutas.

VII. Imminente mortis periculo, ubi parochus, vel loci Ordinarius, vel sacerdos ab alterutro delegatus, haberi nequeat, ad consulendum conscientiae et (si casus ferat) legitimationi prolis, matrimonium contrahi valide ac licite potest coram quolibet sacerdote et duobus testibus.

VIII. Si contingat ut in aliqua regione parochus locive Ordinarius, aut sacerdos ab eis delegatus, coram quo matrimonium celebrari queat, haberi non possit, eaque rerum conditio a mense jam perseveret, matrimonium valide ac licite iniri potest emisso a sponsis formali consensu coram duobus testibus.

IX. § 1°. Celebrato matrimonio, parochus, vel qui ejus vices gerit, statim describat in libro matrimoniorum nomina conjugum ac testium, locum et diem celebrati matrimonii, atque alia, juxta

modum in libris ritualibus vel a proprio Ordinario praescriptum; idque licet alius sacerdos vel a se vel ab Ordinario delegatus matrimonio adstiterit.

§ 2°. Praeterea parochus in libro quoque baptizatorum adnotet, conjugem tali die in sua parochia matrimonium contraxisse. Quod si conjux alibi baptizatus fuerit, matrimonii parochus notitiam initi contractus ad parochum baptismi sive per se, sive per curiam episcopalem transmittat, ut matrimonium in baptismi librum referatur.

§ 3°. Quoties matrimonium ad normam n. VII aut VIII contrahitur, sacerdos in priori casu, testes in altero, tenentur in solidum cum contrahentibus curare, ut initum conjugium in praescriptis libris quam primum adnotetur.

X. Parochi qui heic hactenus praescripta violaverint, ab Ordinariis pro modo et gravitate culpae puniantur. Et insuper si alicujus matrimonio adstiterint contra praescriptum § 2 et 3 num. V, emolumenta *stolae* sua ne faciant, sed proprio contrahentium parocho remittant.

XI. § 1°. Statutis superius legibus tenentur omnes in catholica Ecclesia baptizati et ad eam ex haeresi aut schismate conversi (licet sive hi, sive illi ab eadem postea defecerint), quoties inter se sponsalia vel matrimonium ineant.

§ 2°. Vigent quoque pro iisdem de quibus supra catholicis, si cum acatholicis sive baptizatis sive non baptizatis, etiam post obtentam dispensationem ab impedimento mixtae religionis vel disparitatis cultus, sponsalia vel matrimonium contrahunt: nisi pro aliquo particulari loco aut regione aliter a S. Sede sit statutum.

§ 3°. Acatholici sive baptizati sive non baptizati, si inter se contrahunt, nullibi ligantur ad catholicam sponsalium vel matrimonii formam servandam.

Praesens decretum legitime publicatum et promulgatum habeatur per ejus transmissionem ad locorum Ordinarios: et quae in eo disposita sunt ubique vim legis habere incipiant a die solemni Paschae Resurrectionis D.N.J.C. proximi anni 1908.

Interim vero omnes locorum Ordinarii curent hoc decretum quamprimum in vulgus edi, et in singulis suarum dioecesum parochialibus ecclesiis explicari, ut ab omnibus rite cognoscatur.

Praesentibus valituris de mandato speciali SS^{mi} D.N. Pii PP.X., contrariis quibuslibet etiam peculiari mentione dignis minime obstantibus.

Datum Romae die 2^{a} mensis Augusti anni 1907.

VINCENTIUS Card. Ep. Praenest., *Praefectus.*

C. DE LAI, *Secretarius.*

2. SUBSEQUENT DECREES.

The decree *Ne temere* has subsequently been elucidated by various decrees of the Sacred Congregation of the Council, of which I select the following :—

1 Feb., 1908.

An decreto *Ne temere* adstringantur etiam catholici ritus orientalis ?

Resp. *Negative.*

Num in imperio Germaniae catholici, qui ad sectam haereticam vel schismaticam transierunt, vel conversi ad fidem catholicam ab ea postea defecerunt, etiam in juvenili vel infantili aetate, ad valide cum persona catholica contrahendum adhibere debeant formam in decreto *Ne temere* statutam, ita scilicet ut contrahere debeant coram parocho et duobus saltem testibus ?

Resp. *Affirmative.*

28 Martii, 1908.

Utrum validum sit matrimonium contractum a catholica ritus atini cum catholico ritus orientalis, non servata forma a decreto *Ne temere* statuta ?

Resp. *Negative.*

An in art. XI § 2 ejusdem decreti sub nomine acatholicorum comprehendantur etiam schismatici et haeretici rituum Orientalium ?

Resp. *Affirmative.*

27 Julii 1908.

Ar vi decreti *Ne temere*, etiam ad matrimonia mixta valide contrahenda, ab Ordinario vel a parocho exquirendus et excipiendus sit contrahentium consensus ?

Resp. *Affirmative, servatis ad liceitatem, quod ad reliqua, praescriptionibus et instructionibus S. Sedis.*

An et quomodo providere expediat casui quo parochi a lege civili graviter prohibeantur quominus matrimoniis fidelium assistant nisi praemissa caerimonia civili, quae praemitti nequeat, et tamen pro animarum salute omnino urgeat matrimonii celebratio ?

Resp. *Non esse interloquendum.*

Appendix B

LETTER OF THE ARCHBISHOP OF CANTERBURY.

LAMBETH PALACE, *June* 25, 1912.

MY DEAR BISHOP OF LONDON,—It is not surprising that people should be disquieted by things which have been said in the recent lawsuit respecting the interpretation of an Act of Parliament relied on by Canon Thompson as justifying his refusal of Holy Communion to Mr. and Mrs. Banister. The legal points involved are intricate and technical, and you may perhaps remember that I endeavoured more than two years ago, in a published letter to Dr. Inge, now Dean of St. Paul's, to point out their very limited bearing upon the large and vitally important question of the Church's rights and jurisdiction in her own Courts and over her own members. I showed that the only point which had been really before the Court of King's Bench and the Court of Appeal was whether or not the Dean of Arches had rightly interpreted a particular clause in an Act of Parliament. Recent utterances and *dicta* by the highest judicial authorities, and still more the current popular interpretation of these utterances, increase the importance of the distinction to which I drew attention between the responsibility of the Court of King's Bench and the higher tribunals for interpreting an Act of Parliament and the responsibility of our Ecclesiastical Courts for interpreting and applying our own Rubrics

The contention that it rests with Parliament or with the Civil Courts and not with the Church itself, which has authorities and Courts for the purpose, to determine the conditions of the admission of our members to Holy Communion is untenable, and if it were to be authoritatively asserted acquiescence in it would be impossible. It has not, so far as I can see, been authoritatively asserted, though I own that some of the judicial language used in the Civil Courts seems to go perilously near to such a contention. The much more rough-and-ready conclusions drawn in certain newspapers and elsewhere may be ascribed, I think, to a popular misunderstanding of the technical points involved, and of the true position of our ecclesiastical law.

I will not attempt to re-argue what I said on that subject in 1910. Those who are interested in these grave but technical considerations will find in my letter (see *The Times* of February 8, 1910, and *Guardian* of February 11, 1910, page 215, and elsewhere) as careful a statement of the facts as I could give in short compass.[1] What I there said has never, so far as I know, been controverted.

As regards the practical question which underlies these technical points—the question, namely, whether a man who under the existing law marries his deceased wife's sister ought or ought not to be admitted to Holy Communion—no universal or sweeping decision has been, or, I think, can rightly be, laid down.

A few weeks after the passing of the Act I wrote, as you may remember, to my own diocese a long letter (published by Macmillans in pamphlet form) in which I tried to deal with the whole question which had arisen. In it I pointed out (pages 49-50) that, greatly as I deplored the Act, it is in my judgment impossible to regard a man as becoming *ipso facto* " an open and notorious evil-liver " on account solely of contracting that particular marriage after it had as a civil contract been expressly sanctioned by English law. If, as is perfectly possible, he is to be rightly repelled from Communion either for a time or permanently, such repulsion would have to be on other grounds than the application of the words which I have quoted.

I wrote on my own sole responsibility, and indeed I felt myself precluded from consulting ecclesiastical Judges, before whom the question might officially come. But it was a satisfaction to

[1] The most important passage in the Archbishop's letter of Feb. 4th, 1910, is the following:—

"The Dean of the Arches seems to me to have said no word which could imply that the Church has lost the right—a right which we must regard as essential—to determine the conditions of admission to Holy Communion. He pointed out, for example, that he had not before him the question whether the parties could be, or ought to be, excommunicated by a sentence of the Bishop's Court under the jurisdiction which used in former days to be freely exercised and which is, I believe, still recognized by express statutory enactment. The question before him was restricted to the validity or invalidity of the incumbent's act of repulsion carried out on his individual responsibility. I pass over the Bishop's private communications, for these obviously could not be officially recognized.

"This question had to be answered by a consideration of what is the extent of an incumbent's personal power in the matter. With this the judgment of the Court of Arches dealt. The Dean of the Arches ruled that to contract a legally valid marriage with a deceased wife's sister does not, of itself, bring the parties into the category of 'open and notorious evil-livers' within the meaning of the rubric; and, further, that a particular proviso in the recent Act of Parliament does not, when properly construed, bear the construction for which the incumbent contended. This, and this only, is the finding of the Church Court."

me a few months later to find my view on that particular point supported by the Dean of Arches in his formal judgment.

Again, when the Lambeth Conference of Bishops from all parts of the world considered in 1908 the marriage problems submitted to it, the great committee of thirty-four Bishops agreed to a report in which they say (page 143) :—

" We are of opinion that marriage with a deceased wife's sister, where permitted by the law of the land, and at the same time prohibited by the Canons of the Church, is to be regarded not as a non-marital union, but as marriage ecclesiastically irregular while not constituting the parties ' open and notorious evil-livers.' "

So far, then, as the ecclesiastical opinion of our Church has found formal expression, it would seem to accord with what has incidentally been said on this particular point by the Judges of our highest civil Courts; although, as I have pointed out, the interpretation or application of the Rubric (apart from the Act of Parliament) was not technically before them.

It is popularly contended by some of those who have not, I think, given adequate attention to the Dean of Arches' judgment, that as a matter of fact the Act of Parliament does effectively change the Church's law, because a man who would before the passage of the Act have been rightly repelled from Communion as " an open and notorious evil-liver," is no longer, after the Act, in a position to which these words are applicable. Upon that contention I would say two things—first, that as a matter of fact the stoutest opponents of the Act—of whom I claim to be one—must admit that there is a marked distinction between the case of a man who has conscientiously contracted a marriage ecclesiastically irregular but expressly legalized and validated, and the case of a man who is living with a woman not legally his wife, is producing illegitimate children, and is capable during his partner's lifetime of forthwith marrying another woman. The words " open and notorious evil-liver " may surely be applicable in the second case and inapplicable in the first, however strongly we may disapprove the course which the man has taken. In the next place, it has nowhere, so far as I can see, been authoritatively declared that the passage of the Act has made discipline impossible in the case of an ecclesiastically irregular marriage. The Ecclesiastical Court has said that the particular marriage in question does not *per se* make those who contract it " open and notorious evil-livers," and further, the Ecclesiastical Court has been supported by the Civil Courts in saying that the Parliamentary subsection on which Canon Thompson relied has not the effect which he supposed it to have. That is all. Quite obviously the position in which matters stand is anxious and difficult.

We have anticipated it ever since these controversies began. That the difficulties are insuperable I do not believe.

It seems to me that the most important thing to bear in mind at this moment, in view of current and not unnatural anxiety, is that nothing has really been done which impairs the Church's right through her own authorities and tribunals to interpret her own rubrics and to regulate her own terms of Communion. Our Representative Church Council in 1910 recorded its " emphatic opinion that any assumption that the State can by Parliamentary legislation practically dictate the terms of admission to Holy Communion is a position which cannot be accepted by the Church." When putting to the vote that resolution, which was carried by Bishops, clergy, and laity *nemine contradicente*, I ventured to describe it as a self-evident proposition which hardly required the vote of the Council. It is difficult to exaggerate the importance of maintaining these principles at a time when it is regarded by some people as not improbable that an attempt may be made in Parliament to alter our marriage laws in a more drastic and far-reaching way than was effected by what we regard as the unhappy Act of 1907.

I am, yours very truly,

RANDALL CANTUAR.

Appendix C

A PROPOSED MODE OF CONTRACTING MARRIAGE.

With the author's permission I have extracted from the Rev. J. Fovargue Bradley's *Religious Liberty in England* the following proposal for reform in the manner of contracting marriage. The outlines of the scheme were furnished by a Committee on which I served, but Mr. Bradley worked them out with so much thoroughness that I am glad to avail myself of his labours.

The scheme forms part of a draft Bill, " To terminate the Establishment of the Church of England, to make provision in respect of the Temporalities thereof ; to secure religious liberty in England and Wales and for other purposes." Mr. Bradley saw that such a sweeping measure would make a revision of the Marriage Law necessary, but the scheme is detachable from the rest of his proposals. I have made some criticisms in the margin.

Part II. Marriage

Notice of Intended Marriage without licence.—6. On and after the date of disestablishment the following order, form, and procedure shall be the order, form, and procedure for contracting marriage, with or by licence, any Act or Acts, or any ecclesiastical custom, practice, or privilege, to the contrary notwithstanding—

(1) Any person intending to contract marriage, without licence, shall apply in person or through the post to the Superintendent Registrar of the district in which such person resides and has been residing for not less than seven clear days before the application, and the Superintendent Registrar shall forthwith deliver to the applicant, or within forty-eight hours send through the post to both contracting parties if residing within his district a form of notice of Intended Marriage as prescribed in the First Schedule to this Act.[1]

(2) The form of Notice of Intended Marriage shall be filled up and signed by the contracting party and shall be returned by person,

[1] I have not thought it necessary to reproduce the Schedules.

or free through the post to the Superintendent Registrar of the district in which the contracting party resides.

(3) The Superintendent Registrar shall, on the Friday of each week, make a complete list of all Notices of Intended Marriages without licence within his district, received by him from Thursday to Thursday, which are in accordance with the provisions of this section, and shall publish, or cause to be published, on Friday or Saturday of each week the names of the contracting parties, in the form prescribed in the Third Schedule to this Act, by being posted up in his office and on the notice board or some other convenient and visible position in connection with the places for public worship in the parish or ward in which the contracting party or parties reside, and otherwise as the Registrar-General may direct.

Persons before whom marriage can be contracted, and procedure of marriage.—7. (1) When a Notice of Intended Marriage has been published in the manner aforesaid, for not less than fourteen clear days, and no lawful impediment has been reported to or received by the Superintendent Registrar, at his office, he shall send through the post or by person to both contracting parties, or to the one contracting party residing within his district, a form of Certificate of Marriage prescribed in the Fourth Schedule to this Act.

(2) When the contracting parties have certified themselves husband and wife in the presence of a Principal Witness who shall for the purposes of this Act be a Minister of Religion, a Justice of the Peace, a Notary Public, or a Commissioner of Oaths, or the Superintendent Registrar of the district who shall not refuse to act, and in the presence of at least two other witnesses, both forms of Certificate of Marriage shall thereupon be signed by both contracting parties, by the Principal Witness, and, at least, two other witnesses and one witness at least shall certify in the manner and form prescribed in the Fourth Schedule to this Act that the contracting party or parties are personally known to such witness.

(3) When both Certificates of Marriage have been signed by both contracting parties and the witnesses aforesaid in the manner prescribed the Principal Witness shall within forty-eight hours return free through the post, or by person, both Certificates of Marriage, endorsed as prescribed in the Fourth Schedule to this Act, to the Superintendent Registrar of the district in which the marriage has been contracted.

(4) Immediately upon receipt from the Principal Witness of both Certificates of Marriage the Superintendent Registrar shall cause the particulars of such marriage to be entered in his Register of Marriages and thereafter shall cause one of the Certificates of Marriage to be filed and duly preserved in his office, or such other place as

the Registrar-General shall direct, and shall send by post the other Certificate of Marriage to the male contracting party which shall be the property of the contracting parties.[1]

(5) The Superintendent Registrar shall on the Friday or Saturday of each week publish or cause to be published in his office and otherwise as the Registrar-General shall direct in the form prescribed in the Fifth Schedule to this Act a complete list of all marriages without or by licence which have been contracted within his district during the week.

Fees.—8. (1) The contracting parties, or one of them, shall remit to the Superintendent Registrar with the Notice of Intended Marriage the sum of two shillings and sixpence as his registration fee, provided both contracting parties reside within his district, and in case one of the contracting parties only resides within his district such contracting party shall remit the sum of one shilling and sixpence with the Notice of Intended Marriage.

(2) The contracting parties, or one of them, shall pay to the Superintendent Registrar as his fee as Principal Witness two shillings and sixpence and to any other Principal Witness not less than two shillings and sixpence.

Marriage by licence.—9. (1) In the event of the contracting parties desiring to contract marriage by licence application shall be made for a form of Notice of Intended Marriage as provided by section six of this Act and the Superintendent Registrar of the district in which the marriage is to be contracted shall immediately upon receipt of such Notice of Intended Marriage publish or cause to be published a notice of such marriage both in his office and on the notice board of any other public buildings as the Registrar-General shall direct, and also in two local daily papers issued either in the morning or evening, and if there be not two such local papers in any one local paper, and if there be no local paper in two London daily papers circulating within the district in which such marriage is to be contracted.

(2) The Superintendent Registrar shall the day following the issue of such notice in a local or other daily paper, provided that no lawful impediment to the intended contract of marriage is reported to or received by him at his office, send by post or by person to both contracting parties the form of Certificate of Marriage prescribed in the Fourth Schedule to this Act and it shall be lawful for any Principal Witness named in section seven (2) to forthwith complete the contract of marriage.[2]

[1] It would seem better that a *copy* of the certificate should be sent to each of the parties.

[2] The wording is faulty here. The parties themselves "complete the contract of marriage."

(3) The provisions of this Act named in section seven for the completion of a contract without licence shall apply to the completion of a contract by licence.

(4) For marriage by licence no resident qualification shall be required, but where neither of the contracting parties have their usual place of abode in the district where the intended marriage is to be contracted both contracting parties shall make an affidavit before the Superintendent Registrar declaring their fixed abode and that they know of no lawful impediment to such marriage, and that in case either of the parties, not being a widower or widow, is under the age of twenty-one years that the consent of the persons or person required by law has been obtained thereto, or that there is no person having authority to give such consent as the case may be.

(5) The cost and fees for marriage by licence shall be five shillings stamp on each Certificate of Marriage, twelve shillings and sixpence to the Superintendent Registrar as his fee and cost of advertisements, and ten shillings if he acts as Principal Witness, and not less than ten shillings to any other Principal Witness as his fee.

Marriage by Special Licence.—10. In the event of any party to an intended contract of marriage being unable to contract marriage under the provisions of this Act by reason of approaching death or by reason of any physical or other infirmity, it shall be lawful for the contracting parties to apply, through the Superintendent Registrar, for a special licence for contracting such marriage, and the Registrar-General, with the sanction of the Lord Chancellor, shall have power to issue a special licence for contracting such marriage on such conditions and terms as the Registrar-General shall determine.

Illegalities.—11. Any Principal Witness or any other witness who shall wrongly and wilfully sign any Certificate of Marriage made under this Act for the purpose of securing or aiding an illegal contract of marriage shall be liable to prosecution before His Majesty's High Court of Justice by the Superintendent Registrar of the district acting on behalf and with the authority of the Registrar-General, and shall suffer the penalties of perjury.

Ministers of Religion protected.—12. Nothing in this Act or any other Act or Acts directing, controlling, or affecting marriages shall be construed as requiring any Minister of Religion to act as Principal Witness under this Act, or as requiring him to officiate at the religious ceremony of any marriage, and nothing in this Act or any other Act or Acts shall be construed as requiring any Minister of Religion or the authorities of any church or of any place of worship to use or lend his or their church or place of worship for the solemnization of any marriage.

Laws requiring buildings to be registered for public worship, and licensed for solemnisation of marriage repealed.—13. On and after the date of the *passing of this Act,* any Act or Acts requiring buildings used or to be used for places of worship to be registered and any Act or Acts, requiring places of worship to be licensed for the solemnisation of marriage shall be repealed.

This Act to be cited with other Marriage Acts.—14. On and after the date of disestablishment Part II of this Act shall be incorporated and cited with the Marriage Acts, 1823 to 1907, except so far as these Acts are repealed by the Sixth Schedule annexed to this Act, and the said recited Acts, or parts of the same not hereby repealed, shall be construed and interpreted in harmony with this Act, and nothing in this Act shall repeal, alter or affect any of the said recited Acts or parts of the same not hereby repealed except so far as is necessary to construe and interpret the same in harmony with this Act, and to carry out the provisions of this Act.

Foreign Marriage Acts not affected.—15. Nothing in this Act shall be construed or interpreted to repeal or alter any of the Marriage Acts, 1849 to 1891, dealing with marriages in foreign countries.

Notary Public.—16. On and after the date of disestablishment the name of the Lord Chancellor shall be read for the name of the Archbishop of Canterbury or the Master of Faculties in any Act or Acts affecting the appointment or controlling the office of Notary Public.

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Spirit of his Son into our hearts, crying, Abba, Father.
7 So that thou art no longer a bondservant, but a son; and if a son, then an heir through God.

desire for prayer, for approach to God as Father, is a witness to our divine nature; it is the yearning of the soul made in the image of God which can know no rest till it find rest in Him. This instinctive yearning is due to the indwelling Spirit.

the Spirit of his Son] The parallel with Rom. viii. 14–17 is very close. There we have 'the spirit of adoption whereby we cry Abba, Father'. This is one of the passages which make it difficult to say how far St. Paul definitely distinguished between Christ and the Holy Spirit.

Abba, Father] Rom. viii. 15; Mark xiv. 36. *Abba* is the Aramaic for *father*; cf. Bar-abbas, abbot. It is probable that the expression was a liturgical formula, derived from the opening words of the Lord's Prayer. Moulton, *Grammar of New Testament Greek, Prolegomena*, p. 10, suggests that the original word was retained 'from the peculiar sacredness of its associations'. He compares the devout Roman Catholic saying his *paternoster*, but, as a good Protestant, he adds, 'Paul will not allow even one word of prayer in a foreign tongue without adding an instant translation.' At the same time the combination of the two words is a good illustration of the fusion of Hebrew and Greek elements in the one Church, though it is hardly likely that St. Paul meant to suggest this directly. It is still less probable that the foreign word is meant to suggest the ecstatic utterance of the 'gift of tongues', regarded as the most conspicuous manifestation of the Spirit's presence (Bacon).

In 1 Cor. xvi. 22 we have the Aramaic *maranatha*, as a sort of watchword of the Christian community; in Rev. i. 7 *nai* (Greek 'yea') and *amen* (Hebrew) are combined, and *māri qīri* (or *kiri*), the Aramaic and Greek for 'my lord', is found in Rabbinical writings (Lukyn Williams).

7. no longer a bondservant] The metaphor of *vv.* 1, 2 is definitely dropped, since in this and the following verses the figure of the son who technically has the status of a slave would not do justice to the thought; actual spiritual bondage is referred to.

In illustration of the analogy of redemption from slavery in this and other passages, the remarks of Deissmann, *Light from the Ancient East*, p. 326, are most valuable. 'Among the various ways by which manumission of a slave could take place by ancient law, we find the solemn rite of fictitious purchase of a slave by some divinity. The owner comes with the slave to the temple, sells him there to the god, and receives the purchase money from the temple treasury, the slave having previously paid it there out of his savings. The slave is now the property of the god; not, however, a slave of the temple, but a protégé of the god. Against all the world, especially his former master, he is a completely free man.' We find repeatedly in inscriptions and papyri the phrase that the slave has been bought by Apollo [or some other god] *for freedom*, the very words used in Gal. v. 1, 13. It is expressly laid down that he may now *do the things that he will*, v. 17. As he is technically the property of

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